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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB15

July 2, 2021

VIA EMAIL

John W. Paradee, Esq.
Baird Mandalas Brockstedt, LLC
john@bmbde.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Paradee:

We write regarding your correspondence, on behalf of your clients, Larry LeGates, Pamela LeGates, and David French, alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to Mr. LeGates’s records request. 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. For the reasons set forth below, we find that Mr. LeGates is the sole party with standing to challenge this denial of access to records and conclude that DelDOT violated FOIA by failing to meet its burden to justify denying records under the attorney-client privilege, attorney work product, or the pending or potential litigation exemption and recommend the steps outlined below.

BACKGROUND

Your clients, Mr. and Mrs. LeGates, own certain property located in Frederica adjacent to Route 1 (“Property”). You allege that another client, Mr. French, has a legally cognizable property right and interest in the Property. On March 16, 2021, Mr. LeGates submitted a request for records from DelDOT, requesting the following records regarding a traffic impact study for a nearby property owned by Ching, LLC:

1. Any documents in your possession which relate or refer to a Traffic Impact Study (“TIS”) prepared by, for, or on behalf of Ching, LLC and/or concerning any property located in Kent County, Delaware and owned by Ching, LLC including but not limited to documents relating to the review and/or approval of any such TIS; and
2. Any correspondence (including emails) regarding the above.¹

DelDOT denied the request in its entirety on April 7, 2021, stating, in part, the following:

The Traffic Impact referenced in your request has not yet been approved and therefore is still considered to be in Draft form. Draft appraisals, negotiations, and contracts are exempt as there is no obligation to provide every draft and every change and those types of materials can be withheld as a “working draft which the author is still revising prior to presentation to a public body.” *See Op. Att’y Gen. 16-IB11*(June 6, 2016). *29 Del. C. § 10002(1)(2)*, “[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” Further, providing copies of contracts under negotiation, including DelDOT’s consultant’s recommendations regarding proposed contract provisions has the ability to harm DelDOT’s “competitive position” and as such, those records are protected from disclosure. *See Op. Att’y Gen. 16-IB11* (June 6, 2016). *29 Del. C. § 10002(1)(2)*. Furthermore, since the negotiations are not yet completed between DelDOT and the developer, providing these documents would harm DelDOT’s competitive position and ability to negotiate an agreement with the Developer now and in the future. Providing the materials would provide access to DelDOT’s identified issues of concern for negotiation, as identified by both DelDOT and its consultant, which are part of the matters being negotiated.²

Additionally, the response stated that certain records were exempt as attorney-client privileged materials under *29 Del. C. § 10002(1)(6)*. DelDOT concluded the response by committing to provide access to the TIS when negotiations are complete and it is no longer a draft working document, if you submit a new request at that time. This Petition followed.

The Petition first asserts that there is no deliberative process privilege exemption under FOIA for a draft TIS, and as Attorney General Opinion No. 05-IB13 is the only opinion wherein an exception for a draft is recognized, it is a narrow exception, one that is only applied to a working draft prior to presentation to a public body and that a public body may not affix the label “draft” to a document to avoid public disclosure. You contrast the circumstances here with those in Opinion No. 05-IB13, stating that there is no contract under negotiation, nor is there any public body to which the TIS will be presented. Second, the Petition states no basis exists for DelDOT to invoke *29 Del. C. § 10002(1)(2)*, which protects the privileged or confidential commercial or financial information of private persons or entities and does not apply to government entities. You claim DelDOT has no competitive position to protect, as it is not competing or negotiating with anyone when it undergoes the TIS process. Finally, the Petition contends that the draft TIS is not

¹ Petition, Ex. A.

² *Id.*, Ex. B.

protected by attorney-client privilege, and without the benefit of a privilege log or an explanation of the particular records withheld or the basis for the privilege, you cannot fathom how any part of the TIS, which “is purely an exercise in traffic engineering” is attorney-client privileged information.³ You contend that DelDOT should be required to produce any “TIS documentation that does not contain legal advice or otherwise privileged communications” and a privilege log for any documents withheld on this basis.⁴

DelDOT, through its counsel, responded on June 8, 2021 to the Petition (“Response”). DelDOT first offers additional facts it discovered since responding to your request. DelDOT advises that the area around Route 1 is impacted by the Corridor Capacity Preservation Program, which was legislatively enacted in 1996. DelDOT alleges that you personally, through your interest in JMER Properties, LLC, own several properties in this area of Route 1 and last year, after submitting several FOIA requests, which were denied by the pending or potential litigation exemption, you filed litigation in Chancery Court in July 2020 on behalf of JMER Properties, despite explicitly denying two months earlier that you had any intent to do so. Upon a closer look at past requests, DelDOT discovered that Mr. LeGates’s request that is the subject of this Petition seeks road access information about the same area as a previous request you filed in lead-up to your pending Chancery litigation, which was denied by DelDOT in May 2020 based on the potential litigation exemption.⁵ As the potential for litigation has now been realized, DelDOT asserts that the pending litigation exemption applies to Mr. LeGates’s request.

DelDOT asserts that the attorney-client privilege, attorney work product doctrine, the draft exemption, and the pending litigation exemption apply to this request. DelDOT’s counsel specifically addresses each rationale in turn. First, in defending the assertion of attorney-client privilege and work product, DelDOT argues that the communications between DelDOT and its counsel related to the pending Chancery litigation and the Ching TIS and negotiation of the response to the TIS are subject to this common law, which is exempt under 29 *Del. C.* § 10002(1)(6). DelDOT points out that FOIA does not require DelDOT’s production of a privilege log.

Second, DelDOT contends that internal working draft documents are excepted from disclosure and explains why it believes the TIS process requires protection from disclosure. A developer first submits a TIS to DelDOT for review and DelDOT, with assistance of its consultant, reviews and prepares a “Draft TIS Review Letter,” which DelDOT alleges contains its and its consultant’s work product and trade secrets.⁶ DelDOT states that “that draft [TIS Review Letter] and the communications between counsel, the engineers and consultant . . . contains counsels’

³ *Id.*, p. 6.

⁴ *Id.*

⁵ This previous request, designated Request 20-0108, seeks all documents concerning “a denial of access (DOA) to or from State Route 1 from or to any property located within one (1) mile of the South Frederica Exchange.” Response, p. 2, Ex. A & B.

⁶ DelDOT does not allege the elements of 29 *Del. C.* § 10002(1)(2) for certain trade secrets and commercial or financial information in its Response.

thoughts and opinions and may include concerns about things like the impact of the review on threatened or pending litigation.”⁷ The draft letter undergoes several iterations and is not shared with the developer, as it is not the final document forming the basis for negotiations. DelDOT notes that as a matter of course, those drafts and comments are often overwritten, deleted, or otherwise discarded. Once final, the Draft TIS Letter Review is submitted to the developer and serves as the starting point for negotiations. If the parties cannot resolve all issues, no Final TIS Review Letter is issued. DelDOT asserts until the Final TIS Review Letter is issued, the parties are continuing negotiations, which if disclosed, could impact DelDOT’s ability to negotiate with other developers. DelDOT maintains that only the final, issued TIS Review Letter is the public document. For the Ching property, the Draft TIS Review Letter was still under review and had not been shared with the developer at the time of DelDOT’s response. Even after it is shared, DelDOT contends that it is still a draft that has not been presented to a public body and therefore, still exempt. DelDOT argues that the premature disclosure of a Draft TIS Review Letter under review puts DelDOT at a competitive disadvantage, as other applicants “can then ascertain DelDOT’s review process, points of concern and matters which may be negotiated away for concessions,” which is “clearly the type of information that should not be divulged,” especially in this case where you stand to gain by using this information in your own TIS review process.⁸ DelDOT argues it “should not be compelled to disclose the internal comments and concerns to a document that will be negotiated with a third party when that information could be used to the detriment of DelDOT’s position and also as part of actual litigation initiated by Mr. Paradee.”⁹

Finally, DelDOT argues that although it was not explicitly asserted in its initial response, this information is properly withheld under the pending or potential litigation exemption under 29 *Del. C.* § 10002(1)(9). DelDOT states that you have an interest in JMER Properties, LLC, which filed suit against DelDOT in July 2020. Noting that both properties are subject to the Corridor Capacity Preservation Program, DelDOT states that the Ching TIS “relates directly to the issues raised in the litigation initiated by Mr. Paradee, including but not limited to, DelDOT’s evaluation of other requests in the impacted area of the Route 1 Corridor, for direct access.”¹⁰ As such, DelDOT maintains that the threat of potential litigation has been realized and “the objective signs are not just of a realistic and tangible threat of litigation, but actual litigation has been ongoing in the Court of Chancery for almost a year.”¹¹ DelDOT alleges that the “fact that Mr. Paradee, who was denied similar records in 2020 in numerous requests now is counsel for the Applicant demonstrates that not only is there a question as to the real party seeking the information, but also that there is active litigation involving the section of Route 1 at issue where Mr. Paradee is counsel.”¹² Finally, DelDOT notes that because of the pending litigation and other reasons, the

⁷ Response, p. 4.

⁸ *Id.*, p. 6.

⁹ *Id.*

¹⁰ *Id.*, p. 2.

¹¹ *Id.*, p. 7.

¹² *Id.*

Ching Draft TIS Review Letter continues to be under review and subject to significant counsel involvement, and no Final TIS Review exists as of the date of this Response.

As DeIDOT raised a new exemption founded on an additional set of facts, you responded, contesting a number of points. You allege that DeIDOT's factual assertions contain several inaccuracies: 1) DeIDOT's allegation that "in the run up to the 2020 elections, questions were raised" in the news regarding the sale/acquisition of certain JMER properties that were not contemplated to have direct access to Route 1 and those news articles led up to your filing of a series of FOIA requests in February to April 2020 could not be true because the requests were submitted prior to the news article;¹³ 2) these prior FOIA requests had nothing to do with the sale of two parcels of excess real estate from DeIDOT to JMER Properties; rather, your 2020 FOIA requests related to DeIDOT's review of the rights of access to and from the Meding property; 3) Ching's Final TIS, which is the subject of your client's request, does not relate to the issues raised in the Chancery litigation, as this Chancery litigation concerns the review of the rights of access to and from the Meding property; 4) you expressly deny DeIDOT's "insinuations" regarding the earlier emails DeIDOT attached to its Response, in which you expressed no intention to file litigation when DeIDOT raised the pending or potential litigation exemption in response to the February to April 2020 requests, which was followed by Chancery litigation in July 2020; and 5) you dispute that Request 20-0108 seeking all documents which concern denial of access to Route 1 from or to any property located within one mile of the South Frederica Interchange is the same request as Mr. LeGates's request for the documents related to the Ching TIS because the Ching property is more than a mile south of this Interchange and because the denial of access and a TIS are two different subjects.

In addition to these factual inaccuracies, you protest the new assertion of the pending or potential litigation exemption based on the pending Chancery litigation, because the request submitted by Mr. LeGates seeks an entirely different TIS for an entirely different property (the Ching property, not the Meding property). Accordingly, you argue that your client's request cannot be denied on the basis of the litigation filed by JMER Properties to enjoin DeIDOT from granting a new access to the Meding property. Further, you note the "ultimate absurdity (and insult)" that if the LeGates had a different attorney, this litigation exemption never would have been used to "unfairly punish[]" your client.¹⁴ You argue DeIDOT is concealing its plans for the area from the people most affected by its decisions and claiming at a minimum, your clients deserve to see the TIS documents and related correspondence that DeIDOT has shared with adjacent Ching property owner, as certainly those documents cannot be considered "drafts," protected by the attorney-client privilege, or any other exemption under FOIA. Finally, you clarify explicitly that there is no pending litigation against DeIDOT regarding the Ching TIS or property, and your clients have done nothing to suggest or threaten such litigation.

¹³ Letter from John Paradee, Esq. to FOIA Coordinator, Delaware Department Justice received June 13, 2021, p. 1; Response, p. 1.

¹⁴ Letter from John Paradee, Esq. to FOIA Coordinator, Delaware Department Justice received June 13, 2021, p. 3.

DISCUSSION

As a preliminary matter, only the party denied access to the requested records has standing to challenge this denial. Mr. LeGates filed this request. Your other clients, Mrs. LeGates and Mr. French, listed on this Petition lack standing, and thus, this Petition is considered solely with respect to your client, Mr. LeGates.¹⁵

FOIA requires a public body to provide access to public records in accordance with the statute.¹⁶ When a public body's denial of access to records is challenged in an action under the FOIA statute, the public body has the burden of proof to justify its denial.¹⁷ The representations of the public body's legal counsel may satisfy this burden.¹⁸

Attorney-Client Privileged and Attorney Work Product Materials

DelDOT first asserts that attorney-client privilege and the attorney work product apply to the communications between DelDOT's assigned Deputy Attorneys General and DelDOT employees in relation to the Chancery litigation and the Ching Final TIS. Section 10002(1)(6) exempts records that are exempt from disclosure by statute or common law, such as attorney-client privileged or work product materials.¹⁹ Pursuant to Section 10003(h)(2), DelDOT correctly notes that an index is not required to be produced, but the *Flowers v. Office of the Governor* case states that a public body may meet its burden by producing an affidavit signed by counsel attesting the records have been reviewed for certain privileges, along with an explanation of the privileges applied.²⁰ Here, DelDOT explained that "the communications between any of DelDOT's assigned DAGs and DelDOT employees advising them on issues related to not only the Litigation, but also,

¹⁵ See *Del. Op. Att'y Gen.* 19-IB59, 2019 WL 6047162, at *2 (Oct. 28, 2019).

¹⁶ 29 *Del. C.* § 10003.

¹⁷ 29 *Del. C.* § 10005(c).

¹⁸ *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).

¹⁹ *Del. Op. Att'y Gen.* 18-IB10, 2018 WL 1405826, at *3 (Feb. 20, 2018) ("We have expressly recognized in the past that the FOIA exemption for 'records specifically exempted from public disclosure by statute or common law' applies to the attorney work product doctrine and the attorney-client privilege."); *Del. Op. Att'y Gen.* 16-IB11, 2016 WL 3462342, at *8 (June 6, 2016) (stating that attorney-client privilege "is a well-established basis for withholding records requested under FOIA.")

²⁰ 167 A.3d 530, 549 (Del. Super. 2017) ("Accordingly, the Court finds that an affidavit, along with a detailed written submission that indicates the reasons for the denial *may* be sufficient to satisfy the public body's burden.").

the [Ching] FTIS and negotiation of the response related to same are subject to the privilege.”²¹ We find that the explanation is generally sufficient, but counsel did not provide an affidavit or statement asserting that all responsive communications have been reviewed and only records meeting this exemption have been withheld. Accordingly, we must find that DelDOT failed to meet its burden and recommend that DelDOT review its records for attorney-client privilege and work product and provide a supplemental response to you indicating the responsive records were reviewed and providing any records that do not qualify as attorney client privileged or work product materials.

Working or Preliminary Drafts

Our Office has previously recognized that public records are “material[s] prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type,” but working drafts are mere precursors to public records, or put another way, “the seeds of a potential public record.”²² Attorney General Opinion No. 05-IB13 determined that although FOIA does not have an express exemption for draft documents and Delaware has not recognized a common law deliberative process privilege for draft regulations presented to a board, “we believe that the courts in Delaware would not define a ‘public record’ under FOIA to include a working draft which the author is still revising prior to presentation to a public body.”²³ In addition, this Office noted that the “premature disclosure of draft contracts under negotiation also could compromise the public body’s (and the public’s) competitive position in those negotiations.”²⁴ This Office also cautioned that the draft label may not be used in bad faith to avoid the disclosure of public records, allowing a public body to delay or cancel the delivery of a final report to qualify as a draft. In this case, DelDOT’s counsel represents that the Draft TIS Review Letter is a working draft that has not been presented to any public body, asserting that premature release would create a competitive disadvantage in these circumstances. The parties have presented no evidence of this bad faith in DelDOT’s draft designations. Accordingly, we determine that the working drafts of the Draft TIS Review Letter are excluded from FOIA’s definition of public records.

DelDOT states that as of the date of its response, the Ching Final TIS had been received,²⁵ and DelDOT staff was working with its consultants and attorneys to formulate a Draft TIS Review

²¹ Response, p. 4.

²² *Del. Op. Att’y Gen.* 05-IB13, 2005 WL 1209243, at *2-3 (May 9, 2005) (citations omitted); *see also Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342, at *5-6 (Jun. 6, 2016).

²³ *Del. Op. Att’y Gen.* 05-IB13, 2005 WL 1209243, at *3.

²⁴ *Id.*

²⁵ Response, p. 2 (“Subsequent to the Litigation being initiated, in November 2020, Ching, LLC submitted a Final Traffic Impact Study (FTIS), prepared by Pennoni, to DelDOT.”)

Letter, but the internal process creating a Draft TIS Review Letter had not been completed.²⁶ DelDOT has no obligation to provide reasons for withholding documents that do not exist; their nonexistence is a complete defense.²⁷

Pending or Potential Litigation Exemption

DelDOT invokes the pending or potential litigation exemption in its Response to this Petition. Section 10002(l)(9) exempts “[a]ny records pertaining to pending or potential litigation which are not records of any court.” Although DelDOT refers to the test for determining the potential litigation exemption adopted by the courts, DelDOT does not allege those factors are met, except to state the potential for litigation has been realized by your filing of the pending Chancery Court litigation. To apply this exemption, we must determine “whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.”²⁸

DelDOT characterizes this Chancery litigation as pending, and your submissions do not contest this factual point. Thus, the focal point of this decision is whether the Ching TIS and related review documents pertain to this pending Chancery Court case. You characterize the subject matter of the litigation, access to the Meding property, and your request as completely separate from the TIS for the Ching property, noting that “litigation was commenced in July of 2020, long before the intended development of the Ching property (and the highway access which that development seeks) was publicly known.”²⁹ You emphasize that neither the Ching property nor its TIS is mentioned in the suit. However, DelDOT draws the nexus between this request and the pending litigation, explaining the Ching property is within the Corridor Capacity Preservation Program along Route 1 and involves a question of access to Route 1.³⁰ DelDOT states that Ching Final TIS submitted to DelDOT “relates directly to issues raised in litigation initiated by Mr. Paradee, including but not limited to, DelDOT’s evaluation of other requests in the impacted area of the Route 1 Corridor, for direct access.”³¹ DelDOT implies that issues involving both

²⁶ Response, p.5 (“As of the date of the response to the FOIA request, the internal draft document had not been finalized or shared with the developer for purposes of initiating the negotiation of the Final TIS Review Letter and what, if any additional improvements were going to be required of the developer for DelDOT to approve their proposed plan.”).

²⁷ *Del. Op. Atty. Gen.* 05-IB19, 2005 WL 2334347, at *4 (Aug. 1, 2005) (“[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.”) (citation omitted).

²⁸ *Del. Op. Att’y Gen.* 21-IB02, 2021 WL 559557, at *2 (Jan. 21, 2021).

²⁹ Letter from John Paradee, Esq. to FOIA Coordinator, Delaware Department Justice received June 13, 2021, n. 1.

³⁰ Response, p. 5 (“Here, the internal drafts of the Draft TIS Review Letter when the area being evaluated is within the CCCP area clearly have a nexus to the pending litigation.”).

³¹ Response, p. 2.

properties' access points are connected, stating that the Draft TIS Review Letter contains work product and trade secrets, "as it relates to the evaluative process and issues of concern for evaluating a TIS, especially where the CCPP must be considered as well as other factors like adjoining properties and proposed and ongoing projects in the area impacted."³² DeIDOT carries the burden of proof in establishing that the records Mr. LeGates requested are not public records, and here, we do not believe that DeIDOT has met that burden. The nexus between the requested records and the pending litigation is certainly not obvious. DeIDOT does not allege the Ching property or TIS is under consideration specifically, and you specifically deny any mention of either in the pending litigation; there appears to be a gap in both geography and timing related to the properties and the submission of the Ching final TIS, respectively. DeIDOT may have an adequate basis to draw this connection, perhaps through a common legal claim involving similarly situated properties, but based on this Response, we find that the exemption is not adequately supported in this instance.

CONCLUSION

For the reasons set forth above, we conclude that DeIDOT violated FOIA by failing to meet its burden with respect to the records it claims are subject to attorney-client privilege, attorney work product, or the pending litigation exemption. We recommend DeIDOT review its records in accordance with this Opinion and provide a supplemental response to you in accordance with the timeframes permitted in Section 10003(h). This response is recommended to include the aforementioned statement regarding the attorney-client privileged and work product materials and any responsive records, with the exception of materials subject to attorney-client privilege or attorney work product and any working drafts, subject to any redactions otherwise appropriate under FOIA.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: George T. Lees, III, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

³² *Id.*, p. 4.