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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB19

August 18, 2021

VIA EMAIL

Shannon Marvel McNaught
Gannett
shannonmarvel@doverpost.com

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

Dear Ms. McNaught:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) 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 discussed below, we find that no violation of FOIA occurred as alleged.

BACKGROUND

You submitted a FOIA request to DNREC on July 13, 2021, seeking “septic system inspection records from 1997 to present for any and all septic systems or cesspools located on the property of [a certain manufactured home community] in Lewes.”¹ The request also identified the

¹ Petition.

property by its tax parcel number. In response, DNREC denied access to these records pursuant to the investigatory files exemption.²

This Petition followed. The Petition alleges that DNREC’s refusal to provide these inspection records “is tantamount to refusing to provide sewer inspection records of any property that has ever been in violation of DNREC regulations or that could possibly face future violations.”³

On August 4, 2021, DNREC’s counsel replied to your Petition (“Response”). DNREC maintains that it is a state agency charged with enforcing Delaware statutes and regulations regarding on-site wastewater disposal systems and may undertake civil, administrative, or criminal enforcement for any violations pursuant to 7 *Del. C.* §§ 6005 and 6013. DNREC states that the septic inspection records are related to an active investigation and that DNREC has issued a notice of violation to this community. If the community fails to comply with the requirements of the notice of violation, DNREC alleges that additional enforcement may occur. DNREC argues that the Petition’s claim that this denial is tantamount to precluding disclosure of all sewer inspections records for any systems subject to violations in the past or future is immaterial to this analysis, and the records requested in this case are “the subject of an ongoing investigation and enforcement action.”⁴ Pointing to Attorney General Opinion precedent, DNREC argues that the records here are compiled for a civil or criminal law enforcement purpose, as the purpose of these inspections is “to uncover violations of Delaware statutes and regulations” and that those violations may lead to a civil or criminal law enforcement.⁵ In this case, DNREC submits that the records are “the foundation of this and any future law enforcement action DNREC may take regarding these violations at [this community].”⁶ As such, DNREC contends that it is “narrowly applying” the exemption in this instance to the inspection records that are the basis for its enforcement action against the community.⁷

² 29 *Del. C.* § 10002(o)(3) (excluding “investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue”).

³ Petition.

⁴ Response.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

DISCUSSION

FOIA mandates that a public body provide citizens with access to its public records for inspection and copying, but certain records are excluded from the definition of “public record.”⁸ The public body has the burden of proof to justify its denial of access to records.⁹ The representations of the public body’s legal counsel may satisfy this burden.¹⁰

The investigatory files exemption excludes from the definition of public records “investigatory files compiled for civil or criminal law-enforcement purposes.”¹¹ Our Office has previously noted that the investigatory files exemption “has been broadly and properly interpreted to apply to a wide variety of criminal and civil investigative files.”¹² In fact, “it applies in many instances to DNREC files when the nature of the work being performed by DNREC is investigative in nature or is being performed by a division of DNREC whose functions are in part investigative in nature.”¹³ In this case, DNREC acted in its investigative capacity when it performed these inspections to investigate and enforce its laws and regulations related to on-site wastewater disposal systems.¹⁴ As a result of these inspections, DNREC’s counsel represents that DNREC is conducting an active investigation of this community’s on-site wastewater disposal system and the requested inspection records are the basis for this on-going enforcement action and any future

⁸ 29 Del. C. §§ 10002, 10003.

⁹ 29 Del. C. § 10005(c).

¹⁰ *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).

¹¹ 29 Del. C. § 10002(o)(3).

¹² *Del. Op. Att’y Gen.* 17-IB21, 2017 WL 3426261, at *1 (July 13, 2017).

¹³ *Id.*

¹⁴ Response (citing 7 Del. C. § 6001 *et seq.*; 29 Del. C. § 8001 *et seq.*; 7 Del. Admin. C. §7101).

enforcement.¹⁵ Based on the foregoing, we find that DNREC's assertion of the investigatory files exemption was proper in these circumstances.¹⁶

CONCLUSION

For the reasons set forth above, we find that DNREC did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: William J. Kassab, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹⁵ Response; *see also Del. Op. Att'y Gen.* 19-IB36, 2019 WL 4538322, at *2 (July 5, 2019) (finding complaint information submitted to the State auditor was exempt under the investigatory files exemption); *Del. Op. Att'y Gen.* 17-IB53, 2017 WL 5256813, at *1-2 (Oct. 10, 2017) (determining that a pre-employment background investigation statutorily required for a Department of Correction position constitutes an exempt investigatory file); *Del. Op. Att'y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017) (“By the very terms of your request, which asks for communications relating to a possible violation of a DNREC secretary’s order, the request seeks documents relating to an investigation [and] Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue.”); *Del. Op. Att'y Gen.* 01-IB04, 2001 WL 1593104, at *2 (Feb. 27, 2001) (concluding that uniform traffic collision reports required to be completed for certain accidents are exempt investigatory file records, as they are used in the investigation and prosecution of drunk driving cases and for driver license administrative proceedings); *Del. Op. Att'y Gen.* 98-IB13, 1998 WL 910199, at *1-2 (Dec. 8, 1998) (determining that a town code enforcement officer’s notices of housing code violations constituted records of an investigatory file that were exempt from FOIA).

¹⁶ This Opinion addresses whether these records are available to you under FOIA and does not address any other avenue by which DNREC makes its information public, such as 7 *Del. C.* § 6014 (“Regulatory and compliance information, facility performance and public information.”).