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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB20

September 14, 2021

VIA EMAIL

Leo A. Ventresca
lventresca@keviware.com

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

Dear Mr. Ventresca:

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 DNREC has not violated FOIA as alleged.

BACKGROUND

You submitted a FOIA request to DNREC dated June 2, 2021, seeking five items:

1. All Notices of Violations issued to any other Delaware entity for use of mobile generators (and related documents).
2. All applications for permits (and any associated memorandum or related documents) by any other Delaware entity, including but not limited to: [other companies] for use of mobile generators.
3. Any DNREC inspections (and related documents, memoranda and records including but not limited to oral or written reports communicated by any person or entity to DNREC) of the Port of Wilmington since 2010.

4. Any examples of DNREC’s assessment of mobile compression ignition nonroad engines for the purposes of determining whether such engines, used for either electrical generation or compression purposes, were determined to be mobile generators and not stationary sources subject to permitting.
5. Any DNREC inspections for air quality violations by off road equipment powered by compression ignition internal combustion engines at other Delaware sites, including but not limited to: [other companies’ sites].¹

In response, DNREC denied access to these records pursuant to the pending or potential litigation exemption.² This Petition followed.

The Petition alleges that DNREC improperly denied your request for records. You argue that “where the records requested are not publicly accessible nor related to any pending or potential litigation, DNREC’s blanket denial is counterproductive to the stated purpose of Delaware’s FOIA,” which permits citizens easy access to public records so the society remains free and democratic.³ In addition, the Petition alleges that under Delaware’s State Implementation Plan to comply with the federal Clean Air Act and a memorandum of understanding between Delaware and EPA Region III, DNREC is required to ensure that these permitting records are accessible for public review. You state that “[a]s the requested documents are public, but are not available on the Delaware Open Data Council’s Open Data Portal or on DNREC’s Environmental Navigator, my FOIA request is the only means to acquire these records – to my knowledge, I have no other means available to me to obtain these requested documents.”⁴

On August 24, 2021, DNREC’s counsel replied to your Petition (“Response”). DNREC asserts that its denial was appropriate under the pending or potential litigation exemption, as there is ample evidence to demonstrate that this request originated from or was submitted on behalf of the law firm involved in a pending appeal before the Environmental Appeals Board. The request for records seeks records related to “any inspections of the Port of Wilmington since 2010 and any records related to any permits, inspections, or investigations of mobile generators or mobile compression ignition nonroad entities ‘by any other Delaware entity.’”⁵ DNREC explains that a Secretary’s Order found GT USA Wilmington, LLC (“GT USA”), the operator of the Port of Wilmington, violated the law by installing and operating generators without a permit. DNREC asserts that on April 9, 2021, GTA USA’s attorney, who is a member of the law firm, Elliott Greenleaf, appealed this Secretary’s Order to the Environmental Appeals Board. DNREC

¹ Petition, Ex. A.

² 29 *Del. C.* § 10002(o)(9) (excluding “records pertaining to pending or potential litigation which are not records of any court”).

³ Petition.

⁴ *Id.*

⁵ Response.

maintains that this appeal is still pending as of the date of the Response. Your request was received by DNREC via facsimile with the transmitting subscriber identification, shown as “ELLIOTT GREENLEAF.”⁶ Based on this identification and the subject matter of the request, DNREC concluded that your request originated from or was made on behalf of GTA USA’s counsel. DNREC contends that the Environmental Appeals Board appeal is considered a quasi-judicial proceeding that qualifies as litigation under the pending litigation exemption. Further, DNREC points out a clear nexus exists between the “Secretary’s Order and EAB Appeal center[ing] around the use of unpermitted generators at the Port of Wilmington [and] . . . inspection records for the Port of Wilmington, applications for permits for generators from other facilities, and inspection records for generators for other facilities.”⁷ DNREC states that although recent precedent does not require the public body to determine that the requesting party be a litigant in order to invoke this exemption, the cases historically refer to this exemption as preventing parties from using FOIA to circumvent discovery rules and advance their personal stake in pending litigation.

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 pending or potential litigation exemption applies to any “records that pertain to pending or potential litigation which are not records of any courts.”¹¹ DNREC claims that this request seeks records that pertain to Appeal No. 2021-02 filed by appellant, GT USA, which is pending in front of the Environmental Appeals Board. This Office considers quasi-judicial proceedings litigation for the purposes of applying Section 10002(o)(9),¹² including the “proceedings of administrative bodies that in essence determine legal rights outside the traditional

⁶ Response.

⁷ *Id.*

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)(9).

¹² *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-5 (May 6, 2003).

court of law.”¹³ This Office has previously determined that an appeal before the Environmental Appeals Board qualifies as pending litigation, and consistent with this precedent, we find that this appeal before the Environmental Appeals Board qualifies as pending litigation.¹⁴

In addition, we must determine whether the requested records pertain to this appeal.¹⁵ GT USA appealed a DNREC Secretary’s Order finding that GT USA violated certain laws and regulations by installing and operating generators without a permit. Your request for various DNREC records related to generators and inspections at the Port of Wilmington clearly pertain to the subject matter of this pending appeal. Based on the foregoing, we determine that the requested records are exempt under 29 *Del. C.* §10002(o)(9).¹⁶

Finally, we note that your allegations regarding DNREC’s obligations under the State Implementation Plan and a memorandum of understanding are outside the scope of this Office’s authority. This Office’s authority is limited to determining whether a violation of the FOIA statute occurred.¹⁷

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

¹⁴ *Del. Op. Att’y Gen.* 18-IB52, 2018 WL 6591817, at *3 (Nov. 29, 2018). In addition to appeals to the Environmental Appeals Board, this Office has determined that various other contexts outside of a courtroom qualify as pending litigation for purposes of the pending or potential litigation exemption. *See, e.g., Del. Op. Att’y Gen.* 20-IB11 2020 WL 1894024 (Mar. 13, 2020) (Public Service Commission proceeding); *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.* 04-IB04, 2004 WL 335476 (Feb. 5, 2004) (arbitration); *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612 (planning board).

¹⁵ *Del. Op. Att’y Gen.* 21-IB02, 2021 WL 559557, at *2-3 (Jan. 21, 2021) (“[W]e 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.”).

¹⁶ Although we need not specifically determine whether you are a litigant in the pending appeal, this factual record indicates that this request originated with or was filed on behalf of Elliott Greenleaf, the law firm representing GT USA in the appeal. When litigants seek records under FOIA to advance their litigation, Delaware courts have rejected this practice, stating that these litigants are not doing so to advance the public’s right to know, but to advance their own personal stake in litigation, and they “will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.” *See, e.g., Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003).

¹⁷ 29 *Del. C.* § 10005(e).

CONCLUSION

For the reasons set forth above, we find that DNREC has not violated FOIA by denying your request for records on the basis of the pending or potential litigation exemption in 29 *Del. C.* § 10002(o)(9).

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Kayli Spialter, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General