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

**Attorney General Opinion No. 21-IB26**

**October 20, 2021**

**VIA EMAIL**

Karl Baker  
[Kbaker6@gmail.com](mailto:Kbaker6@gmail.com)

**RE: FOIA Petition Regarding the Diamond State Port Corporation**

Dear Mr. Baker:

We write in response to your correspondence alleging that the Diamond State Port Corporation (“DSPC”)<sup>1</sup> violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your 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. We determine that the DSPC may apply the draft document exception in these circumstances but recommend the DSPC undertake a review of its records in light of the findings of this Opinion and supplement its response, if necessary.

**BACKGROUND**

You submitted a FOIA request to the Delaware Department of State on May 6, 2021, seeking the following:

I request records of all emails sent to or from state officials (listed below) between Jan. 1[,] 2018 and the present day that include in the sender/recipient lines the email

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<sup>1</sup> 29 *Del. C.* § 8781 (“There shall be established within the Department of State a body corporate and politic, with corporate succession, constituting a public instrumentality of the State, and created for the purpose of exercising essential governmental functions which is to be known as the ‘Diamond State Port Corporation.’”).

addresses that end with “@gulftainer.com;” and/or include in the body or the sender/recipient lines, the names “Eric Casey” and/or Mike Hall and/or Michael Hall and/or Peter Richards. Current or former state officials whose email accounts should be searched for responsive records include Jeffrey Bullock, Eugene Bailey, Doug Denison, Rick Geisenberger, David Mathe, Kristopher Knight, and David Mangler.<sup>2</sup>

The Department’s FOIA Coordinator responded on May 11, 2021, stating that she was forwarding the FOIA request to the Office of the Secretary of State and to the DSPC and noting that those offices may contact you directly if more information was needed to fulfill your request. After the Department asked for the request to be narrowed, you submitted a revised request as follows:

1. I’d like to request the responsive emails from the original request that were sent between October 1, 2019 and Jan. 1[,] 2020 and discuss the [] potential amendment to the concession agreement.
2. I’d like to request responsive emails from the original request that were sent between August 1, 2020 and the present that discuss investments made by GT USA Wilmington and /or financial statements provided to the state by GT USA Wilmington.
3. I’d like to request the responsive emails from the original request that were sent between October 1, 2020 and May 1, 2020 that include the terms “1694” and/or ILA and/or “Ashe” and/or “Cephas.”<sup>3</sup>

The DSPC responded to the first item in the modified request by a letter dated August 31, 2021, attaching a redacted copy of the fully executed Amendment to Concession Agreement (“Amendment”) as a courtesy but denying access to any draft Amendments and emails discussing the drafts and any proposed changes.<sup>4</sup> This letter stated that the draft documents and notes about draft documents, including emails discussing those drafts, are not public records until those drafts are presented to a public body for review, pursuant to Section 10002(o)(6) and Attorney General Opinion precedent. The letter also stated that the DSPC requires additional time to respond to your other two requests.

This Petition followed. You acknowledge that the DSPC’s citation of Attorney General Opinion precedent is correct but contend that the DSPC presented a draft Amendment to the DSPC Board of Directors (“Board”) at the December 17, 2019 meeting, meaning that the emails discussing the draft after that date are public records. The Petition included a copy of the minutes of the December 17, 2019 Board meeting, in which a resolution authorizing the Amendment was discussed. Thus, you argue any responsive emails relating to the draft Amendment among the identified employees after December 17, 2019 should be produced.

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<sup>2</sup> Petition.

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

<sup>4</sup> The Office of the Secretary of State responded separately to your request; its response is not the subject of this Petition.

The DSPC’s counsel provided a response on the DSPC’s behalf on September 29, 2021 (“Response”). The DSPC claims that the sole issue in this Petition is whether the Amendment was presented at the December 17, 2019 meeting. The DSPC submitted an affidavit from the DSPC’s Executive Director providing sworn testimony that “the terms of [the Amendment] had not been finalized by the December Board Meeting” nor was a draft Amendment “submitted to the Board at the December Board meeting or at any point during the [designated timeframe].”<sup>5</sup> Although the Amendment was planned for discussion at the meeting, the DSPC asserts that negotiations were ongoing, and the Amendment was not finalized in time for presentation at the meeting; the resolution was only prepared in time for hand-out at the Board meeting, as evidenced by the agenda included with the Response. The DSPC points out that the minutes indicate the negotiations were still ongoing as of the date of the meeting, as they state that the “lawyers have not been able to agree on the language for the agreement yet.”<sup>6</sup> Instead, the Response states that the resolution authorized the Board chair to execute, deliver, and perform the Amendment after updating the Board about the revised terms. The DSPC asserts that the Amendment was not finalized or executed until after the timeframe designated in the request. In sum, the DSPC argues that this Petition should be denied because a draft amendment was not presented to the DSPC Board at the December 17, 2019 meeting or at any point during the timeframe in the request, and thus, the emails during this timeframe are not public records under FOIA.

## DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying,<sup>7</sup> and the public body has the burden of proof to justify its denial of access to records.<sup>8</sup> The representations of the public body’s legal counsel may satisfy this burden.<sup>9</sup>

The DSPC relies on the exception for working draft documents to deny access to any drafts and emails regarding the draft Amendment. A “public record” is broadly defined in FOIA, but this draft document exception is a carve-out from this broad definition.<sup>10</sup> As this Office has

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<sup>5</sup> Response, Ex. 2.

<sup>6</sup> *Id.*, Ex. 4.

<sup>7</sup> 29 *Del. C.* § 10003(a).

<sup>8</sup> 29 *Del. C.* § 10005(c).

<sup>9</sup> *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).

<sup>10</sup> 29 *Del. C.* § 10002(o) (“‘Public record’ is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public

previously acknowledged, public records generally 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 “the seeds of a potential public record.”<sup>11</sup> Attorney General Opinion No. 05-IB13 concluded 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.”<sup>12</sup> 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.”<sup>13</sup> This Office 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 document to qualify as a draft.

In this case, the DSPC presented sworn testimony to demonstrate that the draft Amendment was not presented to the Board at the December 17, 2019 meeting, nor any time during the timeframe you requested these records. Based on these representations, we determine that the working draft document exception applies to any drafts of the Amendment.

The remaining question is whether any emails related to this draft Amendment are also subject to this exception for draft documents. The DSPC asserts that this exception applies to any “emails discussing those drafts” sent prior to presentation of the draft to a public body.<sup>14</sup> We believe that the application of this principle is narrower than what the DSPC has proposed. Instead of the blanket exception suggested by DSPC, we find that any draft Amendment provisions and revisions made to the draft Amendment should be treated the same, regardless of whether the specific Amendment language appears in the draft itself or in an email. However, this exception does not cover every record discussing the draft Amendment, but merely the specific proposed language and any revisions to that language, *i.e.*, the seeds of what may become the public record. Accordingly, we find that the draft Amendment provisions and the revisions to the Amendment provisions in any responsive emails are covered by this exception for working drafts. We recommend that the DSPC review its responsive records during this timeframe and supplement its response with any records that do not meet this narrow draft document exception as stated herein or another applicable FOIA exemption.

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body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.”).

<sup>11</sup> *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).

<sup>12</sup> *Del. Op. Att’y Gen.* 05-IB13, 2005 WL 1209243, at \*3.

<sup>13</sup> *Id.*

<sup>14</sup> Response.

**CONCLUSION**

For the reasons set forth above, we conclude that the DSPC may apply the draft document exception in these circumstances but recommend the DSPC undertake a review of its records in light of the findings of this Opinion and supplement its response as necessary.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: Katherine Betterly, Legal Counsel to Diamond State Port Corporation