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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB29

November 4, 2021

VIA EMAIL

Amanda Fries
Delaware Online/The News Journal
AFries@delawareonline.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Fries:

We write in response to your correspondence alleging that the City of Wilmington violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your requests 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 herein, we determine that the City has not violated FOIA by denying access to the requested records under 29 *Del. C.* § 10002(o)(9).

BACKGROUND

You submitted two FOIA requests on September 23, 2021 a few minutes apart. In the first request, you sought public records of "all cars impounded by the city's preferred contracted vendor and then sold by said contractor from Jan. 1, 2019 to . . . Friday, Sept. 24, 2021."¹ You noted per its contract, the vendor must provide a list of all cars sold or scrapped two weeks prior to the sale to the police department, including various identifying information about these cars. In the second request, you sought public records of "all cars impounded by First State Towing and ultimately

¹ Petition.

sold by said contractor from Sept. 1, 2016 through Dec. 31, 2018.”² You again noted per its contract, this vendor must provide a list of all cars sold or scrapped two weeks prior to the sale to the police department, including various identifying information about these cars. The City responded on October 1, 2021, stating that the City had already provided some records in response to your May FOIA request and denying the balance of your request pursuant to 29 Del. C. § 10002(o)(9)³ which exempts records pertaining to pending or potential litigation which are not records of any court.

This Petition followed. You allege that the City improperly denied your requests for records because you believe the pending or potential litigation exemption is intended to ensure parties to pending litigation do not circumvent the rules of discovery, and you are “neither a party to the pending lawsuit the city cites nor . . . an attorney representing said parties in the lawsuit.”⁴ Although the City noted that some records had already been provided in response to your May request, you claim that those records “only provide a glimpse into the cars towed and ultimately scrapped as the records encompass June 2020 through December 2020 only.”⁵ You argue that these records indicate upwards of forty percent of towed cars in the City are sold or scrapped, and as a member of the media, you are investigating the timeframe in which these practices occurred and how much money is being made by the towing companies’ sales of City residents’ cars. Further, you state that you believe the City’s claim of the pending litigation exemption is suspect, as these records are requirements in the vendor’s contract and a subset of these records was previously released to you in May.

The City’s counsel provided a response on the City’s behalf on October 15, 2021 (“Response”). On September 22, 2021, the City states it was served with a lawsuit in federal district court naming the City and its current and former towing contractors as defendants. The City represents that this suit alleges that the City and its co-defendants wrongfully towed, impounded, and scrapped vehicles in violation of the United States Constitution. The City asserts that your two requests that are the subject of this Petition were delivered the day after the City was served with this complaint, and its response providing some records to you pre-dated the current pending litigation. The City explains the two-part test used for potential litigation and contends that both parts are met here. The City represents that the discovery phase of the lawsuit has not begun, but the requested records here are clearly pertinent, as the complaint alleges that the City and its contractors’ towing and retention of more than thirty-eight percent of those cars has resulted in a system that is fundamentally unconstitutional. Noting that this case involves the public body from whom the records are sought, the City maintains that it has met the test for this exemption. The City argues that your contention that your status as a non-litigant should disqualify this

² *Id.*

³ Recent legislative changes to Section 10002 resulted in changing the relevant subsection from (l) to (o) for this exemption.

⁴ Petition.

⁵ *Id.*

exemption in this case is flawed, because the plain language of this exemption is not limited to litigants and your interpretation “ignores the fact that once the requested records are provided, there is nothing to prevent a third party from disclosing the records to the opposing party involved in the litigation.”⁶ Although both the courts and the Attorney General Opinions emphasize that FOIA may not be used as a means to avoid the rules of discovery, the City argues that they have also acknowledged that the FOIA process is not intended to aid litigants in advancing their litigation. In this case, if the records were released to you or any outside party, the City contends it “would be tantamount to providing [the] [p]laintiffs the same records outside the protection afforded under the rules of discovery.”⁷ The City notes that before litigation was initiated, it provided you and the litigants with some relevant records and those records were used to prepare the instant litigation, and now the case has been filed, the City and its co-defendants “should not be placed at a disadvantage simply because it is a governmental litigant.”⁸ The City contends, once released, it has no control over who may ultimately receive the records, including the opposing party, and such a result would render this exemption meaningless. Moreover, the City argues that the court process will provide all citizens an opportunity to review the relevant legal and factual questions that “form the basis of the [p]laintiff’s claims without stripping the City of the protections afforded by the rules of discovery and forcing it (and the taxpayers it represents) to litigate on an unlevel playing field.”⁹ The City maintains that “[t]his examination by the Court is the ultimate assessment of transparency and accountability for the City.”¹⁰

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.¹¹ However, “records that pertain to pending or potential litigation which are not records of any court” are exempt from the definition of “public record.”¹²

⁶ Response.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 29 *Del. C.* § 10003(a).

¹² 29 *Del. C.* § 10002(o)(9).

The public body has the burden of proof to justify its denial of access to records.¹³ The representations of the public body's legal counsel may satisfy this burden.¹⁴

The City alleges that the records you seek are exempt pursuant to 29 *Del. C.* §10002(o)(9). To determine if this exemption applies, we must consider the following two factors: 1) whether litigation is pending; and 2) whether the records that the requesting party seeks pertain to that pending litigation.¹⁵ The City's counsel represents that a suit is pending in federal district court against the City and two other defendants regarding the constitutionality of the towing, impounding, and disposal of vehicles in Wilmington. The City attached a copy of this complaint to its Response. Based on this record, we find that this first prong is met.

For the second prong, we must determine whether the requested records pertain to this litigation. These requests for records showing the impoundment and sale of the vehicles by the City's contractors clearly pertain to the pending litigation described herein. Based on the foregoing, we determine that the requested records are exempt under 29 *Del. C.* § 10002(o)(9). However, in the interest of public transparency and consistent with its pre-litigation production of some relevant records, we encourage the City to consider voluntarily producing the requested records to you in whole or in part, subject to any necessary redactions or withholdings, to the extent it does not adversely affect the City's litigation position.

CONCLUSION

For the reasons set forth above, we conclude that the City has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

¹³ 29 *Del. C.* § 10005(c).

¹⁴ *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).

¹⁵ *Del. Op. Att'y Gen.* 21-IB02, 2021 WL 559557, at *2 (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.”); *see also Del. Op. Att'y Gen.* 21-IB20, 2021 WL 4351857, at *2-3 (Sept. 14, 2021).

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: John D. Hawley, Assistant City Solicitor, City of Wilmington (via email)