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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB32

December 1, 2021

VIA EMAIL

Alan McKersie
admjr@comcast.net

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. McKersie:

We write regarding your correspondence alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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 DelDOT has not violated FOIA by denying access to the requested records pursuant to 29 *Del. C.* § 10002(o)(9).¹

BACKGROUND

On August 9, 2021, you submitted a request for records to DelDOT, requesting the following:

In particular, we request copies of any and all records that contain any reference to “Tesla, Inc.,” “Tesla,” “Tesla Motors,” “TSLA,” “Tesla Trust Lease,” “Tesla Gallery,” “Gallery,” “manufacturer ownership of a dealership,” “manufacturer-owned dealership,” “direct sales,” “direct sales by a manufacturer,” or any other name, moniker, or abbreviation used by DelDOT to refer to Tesla, Inc. (“Tesla”) and that were created or modified between January 1, 2019, and the date of this request for the following topics:

¹ Recent legislative changes to the FOIA statute resulted in renaming subsection (l) in 29 *Del. C.* § 10002 to subsection (o).

1. All records, between the DelDOT staff, on the one hand, and DelDOT Secretary on the other hand.
2. All records, between any DelDOT staff and/or DelDOT Secretary, on the one-hand, and any third-party on the other hand, including the Delaware Automobile and Truck Dealers' Association, Inc., and/or any automobile dealer.
3. All internal correspondence and records at DelDOT.
4. All other correspondence and records.²

DelDOT denied the request in its entirety on August 30, 2021, asserting multiple reasons, including: 1) the pending or potential litigation exemption applies, because a realistic and tangible threat of litigation exists; 2) certain records are exempt pursuant to Section 10002(o)(16), which exempts communications sent to and received by the General Assembly members and Section 10002(o)(19), which exempts the communications with a member of the General Assembly or their staff and a constituent; and 3) certain records are subject to the attorney-client privilege or otherwise exempt under Section 10002(o)(6). The response stated that Tesla has asserted through counsel that it intends to file suit if not granted a retail motor vehicle dealer's license; "Tesla has retained Delaware counsel and advised that the complaint appealing the denial of their license to the Courts is drafted and ready for filing."³ DelDOT noted that this process started with Tesla's filing of an appeal through the administrative appeal process, which is a prerequisite to Tesla's complaint that it intends to file. In addition, DelDOT also stated that the Delaware Automobile and Truck Dealers' Association ("DATDA") has threatened litigation, which is reasonably likely based upon prior lawsuits filed in other states where Tesla was issued a license. This Petition followed.

The Petition makes four arguments to support its contention that the request was inappropriately denied. First, the Petition claims that these records are of great public concern and affect the "public's right to know' about private interest groups exercising potentially improper influence over the Delaware government to achieve anti-competitive and protectionist objectives."⁴ Noting that Tesla is the world's leading manufacturer of electric vehicles, which play a significant role in addressing climate change, you contend that traditional car franchise dealers are attempting to block Tesla's store openings and citizens have a right to know "whether and how special interests are impacting their lives and futures."⁵ Second, you argue that the pending litigation exemption cannot justify categorically withholding all responsive documents because many documents have no clear nexus to Tesla's new application for a dealer license. You assert that the litigation here concerns a narrow issue – whether Tesla's most recent application for a dealer license was improperly denied. As you have requested every document mentioning

² Petition, Ex A.

³ *Id.*

⁴ *Id.*, p. 3.

⁵ *Id.*

Tesla back to 2019 and as Tesla has operated a gallery in Delaware for which there is no need for a dealer license, you contend not every record relates to this recent dealer license issue. Moreover, you state that other search terms, such as “manufacturer ownership of a dealer,” “manufactured-owned dealership,” “direct sales,” and “direct sales by a manufacturer” do not mention Tesla at all, and those documents contain DATDA’s or DelDOT’s opinions about direct sales more generally and not just as this issue relates to Tesla. Thus, you contend that DelDOT has not met its obligation to produce objective evidence to show that every document relates to a contested issue in the litigation. Third, you assert that you are not a party to any litigation between Tesla and DelDOT, and “[t]he mere fact that an issue might be subject to litigation should not prevent third parties from accessing documents that ‘would otherwise be public documents freely available to any other citizen seeking them.’”⁶ Fourth, you allege that DelDOT improperly expands the potential litigation exemption by withholding communications with third parties. You state that these records are not internal communications for which there is a reasonable expectation of privacy but instead are communications that originated with outside parties or were sent to third parties. This position, you claim, is inconsistent with FOIA’s purpose of allowing citizens to observe public officials conducting government business. You argue that there is a risk that these materials may reveal that private interest groups are influencing government business in a manner detrimental to the citizens of Delaware.

DelDOT, through its counsel, responded on November 8, 2021 to the Petition (“Response”). DelDOT provides the following background of this matter. DelDOT’s Division of Motor Vehicles (“DMV”) is responsible for the licensing of motor vehicle dealerships in Delaware, and Tesla, a manufacturer of electric motor vehicles, operates a location in the Christiana Mall known as a “gallery” where vehicles are displayed and test driven and additional information regarding purchase is offered. After the gallery’s opening, DATDA submitted a complaint letter to the DMV alleging the Tesla gallery violated Delaware laws regarding the unlicensed sale of vehicles and the prohibition on a vehicle manufacturer engaging in retail sales. Following this letter, Tesla applied for a license to operate a retail motor vehicle dealership in Delaware in January 2019 and submitted a letter to DelDOT in rebuttal of DATDA’s letter.

A license was not issued in 2019, and in February 2021, Tesla submitted a new application to obtain a retail motor vehicle dealer license. In April 2021, the DMV denied the new application, noting Tesla’s right to an administrative hearing before a DMV hearing officer. Tesla’s counsel, Kevin Auerbacher, requested an administrative hearing on April 30, 2021. On May 6, 2021, DelDOT sent a letter scheduling this hearing for June 23, 2021, and eight days later, Bernice Corman, submitted a FOIA request to DelDOT seeking the same records you requested in this matter, which DelDOT subsequently denied based on Ms. Corman’s lack of Delaware citizenship and due to the threat of litigation related to Tesla’s license application.⁷

On the same day DelDOT issued this denial, Tesla submitted a discovery request in the administrative hearing that tracked the language of your request and Ms. Corman’s request almost verbatim. DelDOT states that the request was denied because there are no provisions for discovery

⁶ *Id.*, p. 5 (citing *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826 (Feb. 20, 2018)).

⁷ *See Del. Op. Att’y Gen.* 21-IB18, 2021 WL 3609561 (Aug. 6, 2021).

in the DMV appeal hearings. On June 23, 2021, the DMV administrative hearing officer held the hearing on Tesla's application. At this time, DelDOT asserts that the hearing record shows that Ms. Corman assisted Tesla in the hearing by providing cases for submission to the hearing officer. After the hearing, DelDOT states that it learned of ongoing discussions between Tesla's legislative counsel and elected officials and in those discussions, Tesla "stated that a decision from the hearing officer which affirmed the denial of a retail motor vehicle dealer's license to Tesla would result in a complaint being filed with the Superior Court."⁸ On July 9, 2021, Ms. Corman filed a FOIA petition regarding DelDOT's denial of her request. DelDOT points out that the instant Petition has similarities in format, content, style, and argument to Ms. Corman's petition, arguing that Ms. Corman and Tesla are actually the "driving force behind the pending Petition."⁹ DelDOT states that Tesla engaged in a public campaign on its website seeking to involve Tesla owners to influence this licensing matter. DelDOT asserts that you attempted to contact a DMV director in July, and the information you provided "can only have been premised upon information Tesla was disclosing to its owners."¹⁰

On the day following the issuance of the Attorney General Opinion regarding Ms. Corman's July petition, DelDOT received your FOIA request at issue here, which contains metadata showing Ms. Corman was author and your total editing time was less than two minutes. DelDOT maintains that the efforts of Tesla and Ms. Corman to obtain impermissible discovery through FOIA led another Tesla customer to also submit this request on August 9, 2021. On August 30, 2021, DelDOT asserts that it denied both your request and the other customer's request, and on September 3, 2021, Tesla acted on its prior assertions that it would litigate and filed an action in Superior Court to appeal the denial of the license application, which is still pending. On October 29, 2021, this instant Petition was filed with our Office. In sum, DelDOT states that the "above history and documentary evidence irrefutably supports DelDOT's assertion that the FOIA request never was intended to be a FOIA request and instead was a coordinated effort by Tesla, through Ms. Corman, Mr. Auerbacher, and now [you], to obtain discovery which is not permitted at the DMV appeal hearing stage of the litigation process but is part of Tesla's overall litigation strategy."¹¹ Thus, DelDOT contends that this attempt to gain an advantage during the administrative hearing and now during the appeal should not be sanctioned.

Against this factual background, DelDOT contends the grounds asserted for its denial of your request are appropriate. DelDOT asserts that its invocation of 29 *Del. C.* § 10002(o)(9) is proper, as it satisfies the two-part test for potential litigation. DelDOT asserts that Tesla clearly attempted to obtain discovery through Ms. Corman's request in May, then attempted to request these same items through Tesla's counsel through discovery prior to the hearing, and when those efforts failed, solicited you to obtain the discovery Tesla has been denied. Based on Tesla's

⁸ Response, p. 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, p. 6.

collaborations with Ms. Corman and Ms. Corman's collaborations with you, DeIDOT argues that your contention that you are not a party to the litigation is unpersuasive.

DeIDOT counters your argument that the 2019 and 2020 records which predate the current license application are not related to the instant litigation, as the factual and legal discussions involving the previous application Tesla filed in 2019 are the same as those at issue in the current litigation – whether Tesla, a manufacturer, can be licensed as a dealer in Delaware. Further, DeIDOT points out that DATDA is a statutorily required party to any challenge to the statute prohibiting manufacturers from certain practices, and thus, DeIDOT claims it is rightfully preventing Tesla from obtaining discovery of records related to DATDA that are not permitted by applicable hearing and court rules; the proper avenue to obtain records sent or received from DATDA are through the discovery process. In addition, DeIDOT notes that the communications with elected officials at the General Assembly fall under Section 10002(o)(16) which exempts communications to and from members of the General Assembly.

Finally, DeIDOT asserts that it properly withheld certain communications under Section 10002(o)(6), as this exemption precludes disclosure of records subject to the attorney-client privilege and attorney work product doctrine. As DeIDOT sought the assistance of its counsel both in 2019 when Tesla submitted its first application and in 2021 during this current matter, DeIDOT maintains that these communications and the research and other work product attached to the communications are subject to the attorney work product doctrine and attorney-client privilege.

DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records in accordance with the statute.¹² 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.¹³ The representations of the public body's legal counsel may satisfy this burden.¹⁴

The Petition alleges that DeIDOT improperly denied access to the requested records because the records are of great public concern, the potential litigation exemption does not exclude communications with outside parties, and DeIDOT failed to support its assertion of 29 *Del. C.* § 10002(o)(9), as you are not a party to the litigation and some requested records do not relate to a contested issue in the litigation. As there is no statutory basis to make exceptions to FOIA's exemptions in Section 10002(o) based solely on the significance of the public interest nor a basis

¹² 29 *Del. C.* § 10003.

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).

in the potential litigation exemption to exclude records transmitted to outside parties, the first two issues are without merit.

The remaining question is whether DelDOT properly asserted 29 *Del. C.* § 10002(o)(9) to deny access to the requested records. To determine whether the pending litigation exemption applies, we must consider two factors: 1) whether litigation is pending; and 2) whether the records that the requesting party seeks pertain to that pending litigation.¹⁵ Delaware Code provides that “[a]fter the hearing, the Director, upon receiving a decision from the hearing officer upholding the Division’s position, may . . . refuse to approve an application” and that the Director’s decision is appealable to the Superior Court within thirty days.¹⁶ DelDOT asserts that DMV’s denial of Tesla’s license application was upheld and within a few days after the denial of your FOIA request, Tesla filed an appeal of this decision, which is currently pending in Superior Court.¹⁷ On this record, we find that the first prong is met; there is pending litigation involving DelDOT and Tesla.

For the second prong, we must consider whether the requested records pertain to the pending litigation. In light of the circumstances in this case, including the nature and timing of the request, we determine that there is sufficient evidence to establish that the requested records relate to the pending litigation between Tesla and DelDOT.¹⁸ As DelDOT has demonstrated, your request results from coordinated efforts with the litigant in this pending appeal through its consultant; in addition to the other factors DelDOT identified, we can plainly discern that Ms. Corman, who identified herself as a consultant to Tesla in the licensing proceedings in Delaware, previously submitted this same FOIA request to DelDOT prior to the hearing and that Tesla’s counsel in the administrative hearing, Mr. Auerbacher, also sought these items in its pre-hearing

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).

¹⁶ 21 *Del. C.* § 6315 (“The Director shall provide written notice to all parties involved of the decision by certified mail, return receipt requested. The decision is appealable to the Superior Court. Any appeal must be filed within 30 days of the earlier of the receipt of the decision by the dealer or the date of receipt of the return receipt by the Division.”).

¹⁷ *See Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (finding that the plaintiff who submitted a pre-litigation FOIA request for a record is not entitled to that record under the pending litigation exemption, as the requested record pertains to the currently pending litigation between the parties); *Del. Op. Att’y Gen.* 16-IB15, 2016 WL 3462346, at *4 (Jun. 10, 2016) (finding that litigation initiated after an agency denied a FOIA request, but before this Office issued an opinion, constituted pending litigation for purposes of the pending or potential litigation exemption).

¹⁸ *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *5 (May 6, 2003) (“We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.”).

discovery request to the DMV hearing officer.¹⁹ In the midst of Tesla’s legal actions to contest and appeal the denial of its dealership license application, your request seeks the records referencing Tesla, a manufacturer’s ownership of a dealership, and other associated terms since 2019, the year in which the first Tesla application was filed, and including internal communications and external communications with other industry groups potentially interested in the matter. The pending litigation involves Tesla’s application for a dealership license including the implications of its status as a manufacturer under Delaware laws.²⁰ On this record, we find that DelDOT satisfied this second prong by demonstrating that the records you seek pertain to the pending litigation.²¹ We conclude that this request aims to aid a litigant in obtaining records to advance its interest in pending litigation, and it is a well-settled principle that FOIA is not intended to permit a litigant to use FOIA in this manner.²²

CONCLUSION

For the reasons set forth above, we determine that DelDOT has not violated FOIA by denying access to the requested records based on 29 *Del. C.* § 10002(o)(9).

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

¹⁹ See Response; Ex. D, H, N, R.

²⁰ See Response; Ex. B; Affidavit of Deputy Attorney General George Lees.

²¹ See *Office of the Pub. Def. v. Del. State Police*, 2003 WL 1769758, at *2 -3 (Del. Super. Mar. 31, 2003) (declining to allow a litigant to seek materials through a FOIA request that may directly or indirectly assist the litigant in court).

²² *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (“Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”) (citation omitted); *Office of the Pub. Def.*, 2003 WL 1769758, at *3 (noting that this case is “exclusively about litigators and litigants looking for materials that might help them in court” and that “the legislature has made it clear that [FOIA] is not intended to supplant, nor even to augment, the courts’ rules of discovery”); *Del. Op. Att’y Gen.* 17-IB24, 2017 WL 3426264, at *2 (July 14, 2017) (“What is well-settled, however, is the Delaware courts’ strong opposition to allowing litigants to use FOIA as a means to advance their existing litigation position.”).