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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB34

December 10, 2021

VIA EMAIL

Jeffrey C. Smith
jcs@wpa.org

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Smith:

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 asserting it had no responsive records to provide at the time of its response to your request.

BACKGROUND

You submitted a request for records to DelDOT dated September 15, 2021:

Related to Small Cell Permits as of September 15, 2021 in the State Seashore State Park north of Indian Inlet extending to the southern border of the Town of Dewey Beach. The DelDOT database lists nine (9) permits as of today (attached listing) but we have information the database is in error and the public may not be provided current information.

- A. Please include a LIST of Permit applications, or approved permits NOT this list in the specified area as defined above (the only current listed permits are #28, #29, #30, #31, #35, #44, #46, #59, and #75).

B. Please include copies of the Permit Applications and Approvals Listed in item A with supporting information.¹

DelDOT denied the request in its entirety on September 21, 2021, asserting that as of the date of its response, it had no responsive records. DelDOT described an avenue for you to address any concerns that unpermitted work is occurring in your area:

DelDOT is aware that Verizon has been in the area(s) you've specified and working on approved/permitted sites. However, if you believe there is work being performed in other locations where you do not believe there is a permit for the tower, you can send those concerns to community relations at dotpublic@delaware.gov and they will look into any possible issues.

However, as of the date of this email DelDOT has no records that are responsive to your request and this FOIA request is now closed.²

The Petition alleges that although DelDOT claims that the requested records, standard small cell or 5G pole permits or permit applications not already included on DelDOT's website, do not exist, you have photographic evidence of work occurring in areas you believe are not covered by these listed permits. You argue that if "there are no such permits or [a]uthorizations at those locations, it may indicate construction by specific telecoms who may be installing their own company branded equipment without permits in the Seashore State Park."³ The Petition states that you have found nothing in the database to indicate that permits have been issued in any nearby location in the State Park that correlate to the markings and facilities you identified in the attachments to the Petition. You contend that the wireless facilities in the area south of Dewey Beach to the Indian River Inlet Bridge are newly constructed poles owned by one telecommunications provider, and you believe there are at least nine additional sites "roughed in," partial equipment at four other locations, and at least twenty other locations with markings on the pavement. You also maintain that you followed up with the community relations staff as DelDOT suggested, but "received only the most basic form type letters back."⁴ Finally, you request that our Office consider expanding your request for records and ask DelDOT for current and prior copies of small cell permits and the related correspondence for the poles in the State Park north of the Indian River Inlet Bridge. Although you acknowledge this addition to your request is outside the scope of your original request, you contend that it serves a public good due to the substantial public interest in this matter.

DelDOT, through its counsel, responded on November 18, 2021 to the Petition ("Response"). DelDOT describes its history of responding to three requests you submitted during

¹ Petition, Ex 1.

² *Id.*, Ex. 2.

³ *Id.*, p. 1.

⁴ *Id.*, p. 4.

the past year and notes that a putative class action suit has been filed in the Court of Chancery that concerns the cell poles in the municipality of Dewey Beach. The request which is the subject of this Petition is your third request of this year. DelDOT affirms “nothing was withheld, as there were no issues with DelDOT’s websites as all cell poles were identified on the website and there were no ‘unpermitted’ installations or facilities.”⁵ In its Response, DelDOT included the affidavit of its Utility Engineer responsible for the utility coordination for small cell permitting, who provided sworn testimony that he “personally reviewed the available records to confirm that DelDOT is not in possession of records responsive to [your] request for information regarding *unpermitted* small cell locations.”⁶ The Utility Engineer also represents that he reviewed your request containing the list of permits you observed and the website to verify the website contains information on all of the small cell facilities in the area, but it appears that you were unable to identify the locations in close proximity to one another during your use of the website.⁷ In addition, the Utility Engineer notes that certain work performed by utilities on existing permitted facilities do not require a permit. He states that he is “not aware of any work being performed or facilities installed in the areas identified” in your FOIA requests where a permit was required and no permit was obtained.⁸ DelDOT states that the “attached Affidavit . . . makes it clear that DelDOT does not have records for unpermitted facilities in the area identified.”⁹ Thus, DelDOT contends that its assertion that it has no responsive records for unpermitted cell poles is proper.

Moreover, DelDOT states to the extent that you also seek information for the permits #28, #29, #30, #31, #35, #44, #46, #59, and #75, DelDOT’s Utility Engineer has advised that the permit applications and the review and approval records do exist and can be provided. Upon payment of \$105.42, DelDOT asserts its staff will provide these records for these nine locations. DelDOT maintains your request to our Office to expand your original FOIA request for additional records is not permitted by FOIA; any request must be made to DelDOT through its FOIA request process.

DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records for inspection and copying in accordance with the statute.¹⁰ 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 of access to any records.¹¹

⁵ Response, p. 5.

⁶ *Id.*, Ex. 24 (emphasis added).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*, p 8.

¹⁰ 29 *Del. C.* § 10003.

¹¹ 29 *Del. C.* § 10005(c).

The crux of your Petition is your concern that in reviewing DelDOT's online database, you cannot identify a permit related to construction observed in the Seashore State Park area and you therefore believe DelDOT may be allowing unpermitted work to occur in this area. You asked DelDOT for a list of all permit applications or approved permits, other than the nine permits in the database at that time, and for copies of these permit applications and approvals with supporting information. The DelDOT Utility Engineer, who is responsible for DelDOT's utility coordination related to small cell permitting, provided an affidavit attesting that he personally reviewed your request and the available records, including the list you provided and DelDOT's website, to determine that no responsive records existed at the time of your request, and he swore, to his knowledge, DelDOT has not withheld any records that would be responsive to your request. On this record, we find that DelDOT has satisfied the burden of proof required by the statute.¹²

The statutory authority of our Office is limited to the consideration of whether DelDOT violated FOIA.¹³ The remaining allegations of the Petition and the request for this Office to expand the parameters of your FOIA request are outside the purview of this Petition and our statutory authority under FOIA. Therefore, these issues are not appropriate for consideration in this Opinion. However, as DelDOT asserts that your concerns may stem from a misunderstanding about the nature of the work in the area, we encourage DelDOT, through the appropriate avenue, to engage in addressing your concerns in the interest of public transparency.

CONCLUSION

For the reasons set forth above, we determine that DelDOT has not violated FOIA by asserting it had no responsive records to provide at the time of its response to your request.

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

¹² *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

¹³ 29 *Del. C.* § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of [FOIA] has occurred or is about to occur.”).