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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB07

April 4, 2022

VIA EMAIL

Randall Chase
rchase@ap.org

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

Dear Mr. Chase:

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”). We treat your correspondence dated February 14, 2022 (“First Petition”) and March 3, 2022 (“Second Petition”) as petitions for determinations pursuant to 29 *Del. C.* § 10005 regarding whether violations of FOIA have occurred or are about to occur in connection with your request. As discussed more fully herein, we determine the First Petition is moot and with respect to your Second Petition, that DNREC improperly denied access to certain requested records under the exception for draft documents. It is recommended that DNREC provide you with a supplemental response to your request in accordance with this Opinion and 29 *Del. C.* § 10003.

BACKGROUND

On October 20, 2021, the Governor signed House Bill No. 8, which enacted the Drinking Water Protection Act, requiring that DNREC, in collaboration with the Division of Public Health, conduct a statewide survey on PFAS in drinking water and provide the results of that survey and a plan for addressing PFAS contamination to the Governor and General Assembly by January 1,

2022.¹ The Division of Public Health was also directed by the Act to establish maximum contaminant levels (“MCLs”) for certain contaminants found in the drinking water.² On January 26, 2022, DNREC submitted an interim status report to the Governor and General Assembly. DNREC’s Media Relations Manager supplied you with a copy of this interim report several days later. Over two weeks later, you then filed the First Petition with this Office alleging that DNREC failed to respond to your January 14, 2022 FOIA request for the following:

[A]ll communications between and among DNREC officials, employees, agents and representatives regarding House Bill 8 of the 151st General Assembly, including, but not limited to, the agency's obligation to conduct a statewide survey on PFAS in drinking water, and to provide the results of the survey, and a specific plan for addressing any PFAS contamination identified in the survey, to the governor and General Assembly by Jan. 1, 2022. The records I am seeking include, but are not limited to, all emails, correspondence, letters, memos, notes, texts, phone logs, faxes, presentations, reports, etc. I am also requesting a list of the drinking water sources and systems that were or will be sampled, records of how and why they were selected for sampling, and the results of each sample. I am seeking all such records for the time period from Jan. 1, 2021 to the present.³

Aside from acknowledging your request, as of the date of the First Petition, you had received no further reply from DNREC. On February 23, 2022, DNREC, through its legal counsel, responded to your request and the First Petition in the same document (“First Response”), stating that your records request was denied in its entirety, because draft documents, including raw data, are not public records. As draft documents are mere precursors to public records, DNREC argues that the raw data it has collected so far is considered draft documents because “it has not yet completed its processing and analysis of that raw data, including but not limited to, an application of that data to the MCLs that have not been established yet.”⁴ Like draft contracts in negotiation that are produced prematurely, DNREC contends that the premature disclosure of this raw data will compromise DNREC’s ability to prepare a final report and plan for presentation to the public bodies. DNREC states that the “General Assembly vested [DNREC] with the authority to survey the state’s water systems, assemble and analyze the raw data, and produce a report and plan that will inform the Governor, the General Assembly and the public about how to address any contamination in the state’s drinking water systems.”⁵ DNREC also contends that the premature release of this data could lead to public misinformation and misunderstanding, and it should be permitted to process the raw data and prepare a final report and plan that provides a

¹ First Response, p. 1.

² *Id.*

³ First Petition.

⁴ Response, p. 3.

⁵ *Id.*

“comprehensive and accurate analysis of any PFAS contamination in the state’s drinking water systems.”⁶

In addition, DNREC argues that any correspondence regarding the survey and raw data are protected by the draft document privilege. To the extent you seek communications between the Department and the Governor or members of the General Assembly, which are outside of the reporting required by the Drinking Water Protection Act, DNREC asserts that those communications are not public documents and are exempt pursuant to executive or legislative privilege. DNREC notes that the executive privilege belongs to the Governor and may only be waived by that office. When the final report and plan are ready, DNREC states that they will be made available to the public.

On March 3, 2022, you submitted a Second Petition contesting DNREC’s rationale for denying your request. You argue that to the extent the draft document exception would apply, DNREC waived that by supplying the General Assembly with an interim status report, and that once the author of a document presents it to a public body for review, that document becomes a public record, despite its draft form. You argue that the definition of “public record” includes information drafted or otherwise compiled or collected by any public body regardless of its physical form or characteristic by which it is stored, recorded, or reproduced. You assert that you are not seeking any draft or unfinished records. You believe that based on DNREC’s public disclosures, a list of the sample sites and some testing data must exist. In addition, you contend that DNREC’s argument that all internal correspondence is considered draft documents is overbroad, as such an exception would subsume all ongoing business of DNREC. Finally, you note that DNREC acknowledged that it is not the holder of the executive privilege and cannot assert it, and even if DNREC could assert the executive privilege on behalf of the Governor, DNREC has not submitted an affidavit showing that it reviewed those records and that the privilege is applicable.

DNREC, through its legal counsel, responded to your Second Petition on March 14, 2022 (“Second Response”). DNREC refers to the content of its First Response and notes that it did in fact, respond to your initial request by providing you with the interim report which remains the only public record available at this time. DNREC also denies that providing this interim report constitutes a waiver and reiterated that once the final report is complete, it will be made publicly available, citing to a website containing the public information about PFAS that DNREC has already made available.

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying, but certain records and information are excluded from the definition of “public record.”⁷ If a public body denies a FOIA request, the public body carries the

⁶ *Id.*

⁷ 29 *Del. C.* §§ 10002, 10003(a).

burden of proof to justify the denial of access to its records.⁸ In certain circumstances, a sworn affidavit may be required to meet that burden.⁹

In this instance, the request involves two categories of records: 1) all DNREC internal communications regarding House Bill No. 8, including correspondence about the agency's obligations to conduct the drinking water survey and create a report about the results and a plan to address contamination; 2) a list of the drinking water sources for sampling, rationale for choosing the sources, and sampling results. As a preliminary matter, we determine that the First Petition's allegation that the response was not timely is now moot, as DNREC provided a response to the FOIA request on February 23, 2022.¹⁰ Additionally, the request asked for correspondence by and between DNREC employees, officials, and representatives. Communications between DNREC and the Governor or the General Assembly are not responsive, and the applicability of the executive and legislative exemptions is not evaluated here.

The remaining claim for consideration is whether the requested records are subject to the exception for draft documents. DNREC relies on the exception for working draft documents to deny access to raw data and internal emails regarding the preparation and drafting of a survey, report, and plan. A "public record" is broadly defined in FOIA, but this draft document exception is a carve-out from this broad definition.¹¹ As this Office has previously acknowledged, public

⁸ 29 Del. C. § 10005(c).

⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

¹⁰ See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) ("[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them."); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiffs' request for a declaration that the Board wrongfully denied them timely access, stating "[b]ecause the documents that are the subject of [plaintiffs'] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot"); *Del. Op. Att'y Gen.* 21-IB01, 2021 WL 559556, at *2 (Jan. 14, 2021); *Del. Op. Att'y Gen.* 19-IB25, 2019 WL 4538311, at *3 (May 10, 2019) ("Based on this record, it is my determination that the allegations in your Petition are now moot, as DOC has completed its final response to your FOIA request."); *Del. Op. Att'y Gen.* 18-IB30, 2018 WL 3118433, *2 (Jun. 7, 2018) ("Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request."); *Del. Op. Att'y Gen.* 18-IB25, 2018 WL 2994703, *1 (May 15, 2018) ("Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request."); *Del. Op. Att'y Gen.* 17-IB35, 2017 WL 3426275, *1 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter "is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter's determination.").

¹¹ 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

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.”¹² Attorney General Opinion No. 05-IB13 concluded that although FOIA does not have an express exemption for draft documents and a Delaware court did not recognize a common law deliberative process privilege in a previous opinion, “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.”¹³ 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.”¹⁴ 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.

Similar to the premature release of a draft contract under negotiation, DNREC argues that the raw sampling data and correspondence should be excluded from public disclosure prior to its presentation to the Governor and General Assembly, as such premature release may interfere with its ability to interpret this data and prepare this report and lead to public misinformation and misunderstanding. However, the working draft document exception cannot apply to the raw data or the internal correspondence, excepting those specific records mentioned below, because raw data and correspondence are not drafts themselves.

When DNREC prepares the drafts of reports, plans, or other documents in connection with its duties under the Drinking Water Protection Act, those draft records, prior to presentation to a public body, would fall under the working draft exception. In addition, as this Office has previously determined, the correspondence directly discussing specific proposed language in a draft and any revisions to that language, *i.e.*, the seeds of what may become the public record, may be withheld under the working draft document exception.¹⁵ Accordingly, we find that the draft documents and the correspondence discussing specific language for the draft documents in

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.”).

¹² *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).

¹³ *Del. Op. Att’y Gen.* 05-IB13, 2005 WL 1209243, at *2 (distinguishing the case of *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. May 19, 1994) as the parties “did not dispute that the draft regulations were a public record under the general definition in FOIA . . . but argued whether they were exempt from disclosure under a common law deliberat[ive] process privilege” and the court “did not have to consider whether a draft writing on which the author is still working is a ‘public record’ for purposes of FOIA”).

¹⁴ *Id.* at *3.

¹⁵ *Del. Op. Atty. Gen.* 21-IB26, 2021 WL 5344302, at *3 (Oct. 20, 2021).

connection with the Drinking Water Protection Act and any revisions to the proposed language of these documents are covered by this exception for working drafts.

Thus, we determine that DNREC failed to meet its burden of demonstrating that all the requested records are exempt under FOIA. We recommend that DNREC provide you with a supplemental response in accordance with this Opinion and the provisions of 29 *Del. C.* § 10003.

CONCLUSION

For the reasons set forth above, we conclude that the First Petition is moot and with respect to the Second Petition, that DNREC improperly denied access to certain requested records under the exception for draft documents.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Devera B. Scott, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General