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

**Attorney General Opinion No. 22-IB24**

**July 11, 2022**

**VIA EMAIL**

Jared T. Green  
Seitz Van Ogtrop & Green, P.A.  
[jtgreen@svglaw.com](mailto:jtgreen@svglaw.com)

**RE: FOIA Petition Regarding the Delaware Department of Transportation**

Dear Mr. Green:

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 properly denied your requests under the pending or potential litigation exemption in 29 *Del. C.* § 10002(o)(9).

**BACKGROUND**

You represent a client who performed two separate contracts for the road construction project for US Route 301. The contracts specify the process for “Claims for Adjustments and Resolution of Disputes” in Section 105.15 of the Supplemental Specifications. Pursuant to the contracts, your client submitted multiple claims resulting from these projects and has been involved in a “protracted claim review process before the DelDOT Claims Committee.”<sup>1</sup>

DelDOT retained outside counsel to represent its interests in the claims process, who provided the following additional facts by affidavit. Your client submitted twelve claims, which were stipulated to be handled in three separate hearings. The first hearing for the DelDOT Claims

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<sup>1</sup> Petition, p. 2; Response, Walton Aff. ¶ 9.

Committee was scheduled to begin in March 2021. At the outset of the first hearing, your client requested about one hundred categories of documents through FOIA, but the parties instead decided to engage mutually agreed-upon discovery. Both the first and second hearings were conducted and final decisions were issued in 2021. The third hearing was conducted in January - February 2022, and the Committee requested post-hearing briefs, which were submitted on April 14, 2022 and May 26, 2022. The Committee's decision was expected by the end of June 2022. Your client may appeal the Committee's decision to the Secretary, and the Secretary's decision may be appealed to an arbitrator.

You sent a FOIA request to DelDOT during the pendency of these proceedings on March 30, 2022, seeking seventeen items in DelDOT's file "relating to the December 3, 2015 United States Department of Transportation TIFA Loan Agreement with the DelDOT for the New U.S. 301 Project (TIFIA – 2016-1001A)."<sup>2</sup> DelDOT responded to your March 30, 2022 FOIA request on April 19, 2022, denying your request under 29 *Del. C.* § 10002(o)(9), as the request pertains to ongoing litigation between your client and DelDOT.

This Petition followed, arguing that the denial of the request was improper under FOIA. Although you acknowledge that a protracted claims review process was ongoing, you state that the pending litigation exemption should not apply in these circumstances. You argue that DelDOT's claims process does not provide for "any mechanism, at any time, for [you] to request and/or receive any documents or discovery from DelDOT."<sup>3</sup> You assert your belief that this pending or potential litigation exemption is aimed at preventing "a litigant or potential litigant from reviewing documents of a party outside of the formal discovery procedures provided by administrative panels, arbitrators, and courts."<sup>4</sup> You contend, in this case, there is no procedure permitting the request and production of your requested documents within the litigation process. Because DelDOT has no procedure for discovery, you assert that the FOIA litigation exception should not apply to your request.

DelDOT, through its counsel, responded on June 15, 2022 to the Petition ("Response"). DelDOT maintains that its denial of your request was proper. DelDOT included the affidavit of its outside counsel in support of its allegations. DelDOT contends that the Petition's claims are not timely, because you previously sent the same requests to DelDOT, which were denied, in February and December 2021. As FOIA requires a petition to be filed sixty days after DelDOT's denial of a request, DelDOT argues that these requests that are the subject of this Petition were merely refiled in March 2022 to avoid the statutory time constraints precluding a petition from being filed pertaining to the previous requests. In addition, DelDOT states that its denial under the litigation exemption is proper, as both prongs of the test for pending litigation are satisfied. Moreover, although the Committee's rules did not provide for it, your client received some limited discovery by agreement prior to the first hearing. DelDOT's outside counsel represents that "thousands of documents were submitted into the record as evidence for the Phase One, Phase

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<sup>2</sup> Petition, Ex. B.

<sup>3</sup> *Id.*, p. 2.

<sup>4</sup> *Id.*

Two, and Phase Three hearings, and there was a total of 24 trial days for presentation of evidence to the Committee. . . .”<sup>5</sup> DelDOT asserts that the facts show that your client is attempting to use the FOIA process to advance its position in this pending litigation against DelDOT, and no exception is appropriate based on the circumstances here.

## DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.<sup>6</sup> However, “records pertaining to pending or potential litigation which are not records of any court” are exempt from the definition of “public record.”<sup>7</sup> The public body carries the burden of proof to justify its denial of access to records.<sup>8</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>9</sup>

DelDOT alleges that the records you seek are exempt pursuant to 29 *Del. C.* § 10002(o)(9) because they directly pertain to ongoing litigation between your client and DelDOT. “[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”<sup>10</sup> “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.”<sup>11</sup> 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.<sup>12</sup>

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<sup>5</sup> Walton Aff. ¶ 23.

<sup>6</sup> 29 *Del. C.* § 10003(a).

<sup>7</sup> 29 *Del. C.* § 10002(o)(9).

<sup>8</sup> 29 *Del. C.* § 10005(c).

<sup>9</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>10</sup> *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at \*9 (Del. Super. Aug. 18, 2016) (citation omitted).

<sup>11</sup> *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

<sup>12</sup> *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).

With regard to the first prong, the parties do not dispute the pending status of the litigation.<sup>13</sup> This Office views quasi-judicial proceedings as litigation for the purposes of applying Section 10002(o)(9), including the quasi-judicial “proceedings of administrative bodies that in essence determine legal rights outside the traditional court of law.”<sup>14</sup> The absence of discovery or judicial review on the merits is not determinative in the analysis; the focus is on the quasi-judicial character of the administrative proceeding.<sup>15</sup> A “judicial act ‘involves exercise of discretion or judgment’ such as ‘an act of an administrative board if it goes to the determination of some right,’” and “[t]he act of an administrative board is judicial ‘when there is an opportunity to be heard, and the production and weighing of evidence and a decision thereon.’”<sup>16</sup>

In this case, DelDOT’s contract sets forth the claims review process, which begins with a claim filed by the contractor. DelDOT files a response and then “the contractor may appeal the decision to a reviewing committee which is comprised of five voting members and a non-voting chair, each of which are employed by DelDOT.”<sup>17</sup> The Claims Committee, acting as a decisionmaker and represented by separate counsel, holds hearings transcribed by a court reporter, in which it accepts evidence, and the Committee then issues a final decision. For all these Committee hearings, DelDOT’s outside counsel attests that prehearing memorandums and motions were filed, witness lists and documents to be admitted into evidence were exchanged, evidence was presented, witnesses were called and cross-examined, and a written decision was issued on the claims.<sup>18</sup> The Committee’s decision is appealable to DelDOT’s Secretary and the Secretary’s decision may then be appealed to an arbitrator.<sup>19</sup> The record established at the Claims Committee hearing is binding on the parties in the event that matter is appealed to arbitration.<sup>20</sup>

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<sup>13</sup> Petition, p.2 (noting the protracted claim review process and stating “[w]hether or not what is occurring constitutes ‘litigation’ is open for interpretation”); Response, Walton Aff. ¶ 10 - 22. (explaining the status of your client’s claims in the process).

<sup>14</sup> *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at \*1 (Nov. 13, 2003) (citation omitted); *see also Del. Op. Att’y Gen.* 20-IB11 2020 WL 1894024 (Mar. 13, 2020) (Public Service Commission proceeding); *Del. Op. Att’y Gen.* 19-IB65, 2019 WL 6839916 (Nov. 25, 2019) (personnel board); *Del. Op. Att’y Gen.* 19-IB16, 2019 WL 4538301 (Mar. 22, 2019) (FOIA petition process under 29 *Del. C.* § 10005); *Del. Op. Att’y Gen.* 18-IB52, 2018 WL 6591817 (Nov. 29, 2018) (Environmental Appeals Board); *Del. Op. Att’y Gen.* 04-IB04, 2004 WL 335476 (Feb. 5, 2004) (arbitration); *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612 (planning board).

<sup>15</sup> *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at \*1 - 2.

<sup>16</sup> *Id.* at \*1 (quoting *Black’s Law Dictionary* 984 (4th ed. 1968)).

<sup>17</sup> Walton Aff. ¶ 5.

<sup>18</sup> *Id.* ¶ 10 - 22. However, the third hearing decision is still pending.

<sup>19</sup> *Id.* ¶ 6.

<sup>20</sup> *Id.* ¶ 7 - 8 (reiterating the contractual provisions that the record established at the hearing shall be admissible at arbitration, that the facts established shall be specifically binding on the

Considering the full nature of these proceedings, we find that these proceedings meet the definition of “pending litigation” for purposes of the exemption, and as such, we find the first prong is satisfied.

For the second prong, we must determine whether the requested records pertain to this litigation. The Petition reveals that you clearly seek these records for use in your client’s litigation.<sup>21</sup> Thus, we determine that the second prong is met, and the requested records are exempt under 29 *Del. C.* § 10002(o)(9). Finally, we note that this determination is limited to the matters of FOIA law; whether the claims review process is adequate legal process is outside the scope of this Office’s authority to decide.<sup>22</sup>

### CONCLUSION

For the foregoing reasons, we determine that DelDOT did not violate FOIA by denying access to the requested records under 29 *Del. C.* § 10002(o)(9).

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: George T. Lees, III, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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parties, and that “no material, information, fact, and/or claim not presented at such hearings held pursuant to said Section 105.15 shall be admissible at any arbitration conducted pursuant to this Section”).

<sup>21</sup> Petition, p. 2-3 (arguing that the pending or potential litigation exemption should not apply in this case because DelDOT failed to give your client a means to obtain these records and noting that this discovery is particularly necessary for your client’s claims, given allegations of concealment of information, misrepresentations, and intentional acts).

<sup>22</sup> 29 *Del. C.* § 10005(e).