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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB29

August 23, 2022

VIA EMAIL

John W. Paradee
Baird Mandalas Brockstedt, LLC
john@bmbde.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Paradee:

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 met its burden of demonstrating that the potential litigation exemption applies to the entirety of this request.

BACKGROUND

You represent a propane gas company that installed propane gas distribution lines in the streets of a residential subdivision located in Sussex County. DelDOT has declined to accept the subdivision streets constructed for this community, because DelDOT will not accept these propane lines in the manner in which they were installed in the streets. On May 19, 2022, you sent a request to DelDOT seeking three categories of records: 1) any utility agreements, occupancy agreements, correspondence, memoranda, reports, summaries, inquiries, submissions, applications, designs, plans, drawings, proposals, agreements, permits, approvals or other documents that in any way concern or relate to the supply, provision, distribution, or delivery of propane utility services to or within this community from January 1, 2003 to the date of the request; 2) all documents which in any way concern or relate to the turnover to DelDOT or other dedication to public use, ownership,

and/or maintenance of any residential subdivision streets located in Sussex County from January 1, 2003 to the date of the request; and 3) every iteration or edition of the Development Coordination Manual employed by DeIDOT from January 1, 2003 to the date of the request.

On July 5, 2022, DeIDOT responded to the request, asserting that there have been on-going discussions between the developer, the maintenance corporation, and your client regarding numerous issues with the sidewalks and streets of that community. DeIDOT stated that on December 9, 2021, the DeIDOT Secretary advised that the community streets would not be accepted because of the propane lines your client installed and that follow-up discussions occurred in March 2022 where a representative of your client indicated that “legal counsel would be handling the dispute over whether DeIDOT is exceeding its authority.”¹ DeIDOT stated that the developer’s representative confirmed that you are the attorney that has been retained to sue DeIDOT over its refusal to permit propane lines within DeIDOT’s right of way and to accept the community streets into the State road maintenance system. Based on this statement and the subject matter of your request, DeIDOT asserts that all of its records are exempt under 29 *Del. C.* § 10002(o)(9), and your request is an impermissible attempt to advance your client’s personal stake in the “to be filed” litigation. Even if the pending or potential litigation exemption did not apply, DeIDOT also asserts that the requested records would include attorney-client privilege and work product doctrine and emails to and from members of the General Assembly, which are also exempt from disclosure.

The Petition alleges that DeIDOT has not appropriately denied this request under the potential litigation exemption. You believe that DeIDOT has refused to accept the roads, and you state that you are “trying to ascertain if this is indeed the case, and if so, what the rationale for DeIDOT’s determination might be.”² You state that your client has not threatened any litigation against DeIDOT, nor have you been retained to sue DeIDOT.

DeIDOT, through its counsel, responded on August 3, 2022 to the Petition (“Response”). Counsel for DeIDOT asserts that denial was proper under the potential litigation exemption. DeIDOT described the lengthy history surrounding this matter, including multiple communications in which DeIDOT expressed its position that it would not accept the roads due to the improper gas line installation. Counsel for DeIDOT argues that the potential litigation exemption applies, as litigation filed by your client and the developer is likely or reasonably foreseeable, and all the items in your request pertain to this litigation.

Counsel for DeIDOT believes that the objective signs of imminent litigation are numerous, including that there is a dispute among several parties about who will bear responsibility for the subdivision roads; your client and the developer have expressed their disagreement with DeIDOT’s positions; the courts are the only venue available to resolve such disputes; the homeowners’ association has threatened to escalate the matter and seek legislative intervention; the developer’s communications also have “sufficient language, characterizations, and tones” to indicate that the developer intends to challenge the decision on its own grounds, the developer’s representative

¹ Petition, Ex. D.

² Petition.

informed a DelDOT engineer of your client’s intent to sue; the parties discussed legal action at a meeting; and two DelDOT staff members had conversations with the developer’s and your client’s representatives that “left [them] under the impression” that your client intends to sue.³ In addition to these factors, counsel for DelDOT argues you or your client have not submitted any statement about whether you intend to sue DelDOT on your client’s behalf, and he believes this fact should be interpreted to mean that litigation is imminent. Counsel for DelDOT argues that each of the three categories of records you seek have a nexus to the subject matter of the litigation.

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.⁴ However, “records pertaining to pending or potential litigation which are not records of any court” are exempt from the definition of “public record.”⁵ The public body carries the burden of proof to justify its denial of access to records.⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷

The Petition alleges that DelDOT improperly relied on 29 *Del. C.* § 10002(o)(9) to deny access to the requested records, which exempts “records pertaining to pending or potential litigation which are not records of any court.” Governments always face some threat of suit, and construing “potential litigation” to include “an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].”⁸ To address this dynamic, the Superior Court of Delaware has adopted this Office’s two-prong test for the potential litigation exemption: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”⁹ “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”¹⁰ These signs may include a “written demand letter in which a claim is asserted, or action is demanded, [which] may give rise to a proper inference that litigation will

³ Response.

⁴ 29 *Del. C.* § 10003(a).

⁵ 29 *Del. C.* § 10002(o)(9).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁸ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (citation omitted).

⁹ *Id.*

¹⁰ *Id.*

soon follow.”¹¹ Other indicators may include prior litigation between the parties, proof of ongoing litigation with similar claims, or retention of legal counsel with respect to the claim at issue and expression of an intent to sue.

The second prong of this test requires that the requested records have a clear nexus with the subject matter of the imminent litigation. In this case, you have requested three broad categories of records for the timeframe of January 1, 2003 to the date of the request, including any documents related to providing propane utility services to this community, all documents related to the turnover to DelDOT or other dedication to public use, ownership, and/or maintenance of any Sussex County residential subdivision streets, and every edition of the Development Coordination Manual used by DelDOT. While it is apparent some of these records have a clear nexus to this potential litigation, counsel for DelDOT uses the “potential litigation” as an absolute bar to providing any public documents, which is not consistent with FOIA in these circumstances. DelDOT’s Response fails to articulate how each of these requested records has a clear nexus to the subject matter of this potential litigation. As such, we determine that DelDOT has not met its burden of demonstrating that the potential litigation exemption applies to this request and recommend that DelDOT provide a supplemental response to you consistent with 29 *Del. C.* § 10003 within fifteen business days of this Opinion, unless DelDOT advises of the need for additional time in accordance with Section 10003(h).

CONCLUSION

For the foregoing reasons, we determine that DelDOT has not met its burden of demonstrating that the potential litigation exemption applies to the entirety of this 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

¹¹ *Id.*