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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB37

October 11, 2022

VIA EMAIL

Thaddeus J. Weaver
Dilworth Paxson LLP
tweaver@dilworthlaw.com

RE: FOIA Petition Regarding Office of the Governor

Dear Mr. Weaver:

We write regarding your correspondence alleging that the Office of the Governor (“OGov”) 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 OGov did not violate FOIA by denying access to the requested records by invoking the pending litigation exemption.

BACKGROUND

The Diamond State Port Corporation (“DSPC”) proposed construction of a container port to be located on Hay Road in Edgemoor, New Castle County (“Project”). The Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) issued an order approving a Subaqueous Land Permit and Federal Consistency Certification in connection with the Project. This order was appealed to the Environmental Appeals Board (“EAB”). You submitted a request to OGov on July 12, 2022 for records from December 1, 2018 to the date of the request for nine categories of records related to the proposal by the DSPC for the construction of the Project. The nine items are as follows:

1. Any communications between Governor Carney or the Governor's Office, on the one hand, and federal legislators, on the other, regarding the Project, including but not limited to approvals or permits for the Project.
2. Any communications between Governor Carney or the Governor's Office, on the one hand, and any federal official, on the other, regarding the Project, including but not limited to approvals or permits for the Project.
3. Any communications between Governor Carney or the Governor's Office, on the one hand, and the Delaware Department of Natural Resources and Environmental Control . . . or any representative of DNREC, on the other, regarding the Project, including but not limited to approvals or permits for the Project.
4. Any communications between Governor Carney or the Governor's Office, on the one hand, and any other state official (except DNREC), on the other, regarding the Project, including but not limited to approvals or permits for the Project.
5. Any communications between Governor Carney or the Governor's Office, on the one hand, and any members of the Delaware Assembly (excluding emails), on the other, regarding the Project, including but not limited to approvals or permits for the Project.
6. All documents and communications (including draft legislation) regarding providing funding to either Gulftainer, GT Wilmington USA, LLC ("GT Wilmington"), or DSPC to assist with obtaining, securing, or defending permits for the Project.
7. All documents and communications regarding the financial viability of GT Wilmington and/or DSPC, including any documents or communications concerning whether GT Wilmington or DSPC has the financial resources to complete the Project, perform any required maintenance dredging, and perform any required compensatory mitigation activities.
8. Any communications between Governor Carney or the Governor's Office, on the one hand, and Gulftainer, GT Wilmington, or DSPC, on the other, regarding the Project, including but not limited to approvals or permits for the Project.
9. All documents and communications regarding state officials visiting foreign nations or interacting with representatives of foreign nations or foreign companies regarding the Project or the timing or capabilities of the proposed container facility at the Edgemoor site.¹

The request further defined the terms, DSPC, "federal official," and "state official." OGov denied your request in its entirety on July 15, 2022, because the request sought records pertaining to pending or potential litigation between the State of Delaware and clients of your firm, which are exempt from disclosure. This Petition followed.

The Petition alleges that OGov improperly denied your request. You allege you are a citizen of Delaware, residing in Wilmington and an attorney licensed in Delaware. Your firm serves as Delaware counsel for three clients, collectively referred to as the Port Operators in a pending appeal before the Environmental Appeals Board under the consolidated caption, The

¹ Petition, Ex. 1.

Philadelphia Regional Port Authority v. DNREC, EAB Nos. 2021-08, 2021-09, and 2021-10. The appeal number of the Port Operators’ proceeding is 2021-09. You state that the only issue in the appeal is “whether the Secretary of DNREC properly addressed the issue of whether the proposed expansion of the Port of Wilmington poses a threat to the free navigation of the main navigation channel of the Delaware River, because of the proposed design of a ‘turning basin’ for ships seeking to enter and exit the proposed expanded port facilities, and the associated plans for managing silt (approximately 500,000 cubic yards per year) that will need to be removed in order to keep the main navigation channel, and the expanded port facility, operational.”² Citing *Mell v. New Castle County*, you allege that the pending litigation exemption may only be applied when the parties to pending litigation against a public body seek information from that public body.³ In this matter, you state that the parties to the pending appeal are DNREC and the DSPC, not OGov. In addition, you allege that the requests are not related to the navigation issues which are the subject of this appeal. For example, you contend you seek communications between OGov and federal legislators regarding the Project, including approvals or permits for the Project.

OGov, through its counsel, responded on September 22, 2022 to the Petition (“Response”). OGov contends that its denial under the pending or potential litigation exemption was proper. OGov points out that the appeals challenging this Project have been consolidated and include another appeal filed by another of your firm’s clients, a former general manager of Gloucester Marine Terminals, LLC. OGov states that your other client’s appeal covers a multitude of issues related to the Project. OGov states that these consolidated appeals are scheduled to be heard by the EAB on October 11, 2022. OGov contends that the fact that OGov is not a litigant is not determinative because the pending litigation exemption may apply when the litigant in a suit seeks records against an unrelated third party. Further, OGov alleges that all the items you requested directly pertain to the pending appeal. Six of the nine items in the request seek records regarding the approval or permits for the Project. The sixth item seeks communications that are relevant to the applicants’ process of obtaining, securing, or defending permits for the Project. The seventh item seeks communications about the mitigation measures, which was a key focus in the associated permit hearing. The ninth item seeking documents regarding state officials visiting foreign nations or interacting with representatives of foreign nations or companies pertains to the fact that the Project will be operated by a company headquartered in a foreign nation. OGov states that concerns related to this foreign operation were addressed at the administrative hearings.

Additionally, OGov argues that you have previously attempted to circumvent the limited discovery process available through the pending appeal by filing FOIA requests with other public bodies.⁴ On July 11, 2022, just one day before the request filed here, OGov states that you filed a FOIA request with DSPC with identical wording, except where the request references OGov, the Secretary of State and Department of State was substituted. DSPC, as a party to the active litigation, denied the request. In addition, on November 15, 2021, you filed a FOIA request with DNREC seeking communications between the applicant, DNREC, a specific engineering firm, and

² Petition, p. 5.

³ 835 A.2d 141 (Del. Super. 2003).

⁴ The Response included the affidavit of OGov’s Deputy Legal Counsel and copies of your FOIA requests to DSPC and DNREC and the response from DSPC.

any other Delaware or Federal agency concerning this Project. On July 12, 2022, you asked DNREC for several items regarding the navigation issues in the appeal, and three of the items also overlapped with three items in this request to OGov. OGov argues you are merely trying to obtain from OGov many of the same records you already tried to obtain from the litigants. Finally, OGov asserts that because your clients are not Delaware citizens, they are not subject to the protections of FOIA. OGov contends that Delaware courts have rejected efforts by attorneys, clearly working on behalf of non-citizen clients, to assert citizen status for purposes of FOIA.

DISCUSSION

Under FOIA, “public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”⁵ However, “records pertaining to pending or potential litigation which are not records of any court” are exempt from the definition of “public record.”⁶ The public body carries the burden of proof to justify its denial of access to records.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸

OGov relied on 29 *Del. C.* § 10002(o)(9) to deny access to the requested records. “[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.”⁹ “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.”¹⁰ “And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts’ rules of discovery.”¹¹

The Petition argues that this pending litigation exemption only applies to public bodies that are parties in the pending litigation. Although OGov is not named in the case, we do not accept that OGov, the head of the State Executive Branch, is an unrelated party to this litigation. In this instance, you directed your request to OGov, who has authority over the litigants and who may be

⁵ 29 *Del. C.* § 10003(a).

⁶ 29 *Del. C.* § 10002(o)(9).

⁷ 29 *Del. C.* § 10005(c).

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁹ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

¹⁰ *Mell*, 835 A.2d at 147 (citation omitted).

¹¹ *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

actively involved, and you asked for the same records you sought from the litigants themselves. We do not address your claim that a public body who is not a litigant cannot invoke the pending litigation exemption; we believe that OGov is sufficiently related to the litigation and is not barred from asserting the pending litigation exemption.

To determine if the pending litigation 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.¹² For the first prong, the Petition acknowledges that an appeal to the EAB is pending. As our Office has previously determined, an appeal to the EAB is a quasi-judicial proceeding that qualifies as litigation for purposes of this exemption.¹³ Thus, the first prong is satisfied.

The second prong of this test requires that the requested records pertain to the pending litigation. We consider the timing and nature of your request in regard to your clients' pending, consolidated appeals challenging the DNREC Secretary's order approving the permit and the associated certificate for the Project.¹⁴ The request seeks records expressly related to the approvals or permits for the Project, records related to funding for obtaining or defending permits for the Project, records showing the Project applicants' financial viability, and documents and communications regarding state official and foreign nations or companies regarding the Project. The submitted records make it clear that these requests pertain to this litigation. We also note that your clients' Statement of Appeal expressly reserves the right to assert additional grounds for appeal.¹⁵ In addition, we take notice of the fact that while the consolidated appeals were pending, you asked litigants for the same or similar records. Accordingly, we find that the factual record demonstrates that this request pertains to this pending litigation and find that OGov has not violated FOIA by asserting the pending litigation exemption.

¹² *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).

¹³ *Del. Op. Att'y Gen.* 21-IB20, 2021 WL 4351857, at *2; *Del. Op. Att'y Gen.* 18-IB52, 2018 WL 6591817, at *3 (Nov. 29, 2018).

¹⁴ *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.”).

¹⁵ Petition, Ex. 3.

CONCLUSION

For the foregoing reasons, we determine that OGov did not violate FOIA by denying access to the requested records by invoking the pending litigation exemption.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Matthew F. Lintner, Deputy Legal Counsel, Office of the Governor
Dorey L. Cole, Deputy Attorney General