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

**Attorney General Opinion No. 22-IB51**

**December 19, 2022**

**VIA EMAIL**

Randall Chase  
Associated Press  
[rchase@ap.org](mailto:rchase@ap.org)

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

Dear Mr. Chase:

We write regarding your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. 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 the Petition’s claim that DNREC failed to respond to your request is now moot and that DNREC violated FOIA by denying access to the raw sampling data and related internal correspondence under the deliberative process privilege.

**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. The Division of Public Health was also directed by the Act to establish maximum contaminant levels for certain contaminants found in the drinking water. On January 14, 2022, you sought the following records from DNREC:

[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.<sup>1</sup>

You filed a petition regarding this request, which resulted in Delaware Attorney General Opinion No. 22-IB07. This Opinion found, in part, that DNREC improperly denied access to the raw data and internal correspondence under the exception for draft documents. The Opinion recommended that DNREC supplement its response to your request. You allege that DNREC failed to supplement this response, as recommended. Thus, on September 2, 2022, you submitted another request, seeking the following records:

All records pertaining to the sampling of drinking water systems in Delaware pursuant to House Bill 8 of the 151st General Assembly. The records I am seeking include, but are not limited to, all emails, correspondence, letters, memos, notes, texts, phone logs, faxes, presentations, spreadsheets, reports, etc. The records I am seeking specifically include, but are not limited to, a list of all drinking water sources and systems that were or will be sampled, records of how and why they were selected for sampling, and all testing data and results for each sampling location. I am seeking all such records for the time period from Jan. 1, 2021 to the present. I am also seeking copies of all internal correspondence within DNREC regarding any previous FOIA request for the sampling data and related records.<sup>2</sup>

On October 17, 2022, DNREC informed you that legal review was required and the estimated date for completion was November 4, 2022. After receiving no response for almost two weeks after the estimated completion date, you filed this Petition.

The Petition alleges that as of the date of the Petition, no response from DNREC had been received. In addition, as this most recent request is for similar items as those already recommended for production in the previous Attorney General Opinion No. 22-IB07, you request this Office find a violation and direct DNREC to provide these requested records without further delay.

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<sup>1</sup> *Del. Op. Att'y Gen. 22-IB07*, 2022 WL 1125017, at \*1 (Apr. 4, 2022).

<sup>2</sup> Petition.

DNREC, through its counsel, responded on December 2, 2022 to the Petition (“Response”). DNREC contends that although its response to your request was untimely, your request is moot because DNREC provided all public records that are responsive to your request. DNREC states that it provided, in response to a previous FOIA request, a copy of the final report to the Governor and General Assembly. In addition to this final report, DNREC states that it supplied you with the separate PFAS Work Plan, which included the locations of the sampled sites in August 2022. DNREC states that it also has extensive information about PFAS contamination available on its website.

DNREC contends that other responsive records, the raw data and the related internal correspondence, are not subject to disclosure. Although DNREC acknowledges that this Office rejected its reasoning that the draft document exception applied to the raw data and related internal correspondence, DNREC asks for the reconsideration of disclosure of these records, citing to federal precedent and arguing that the deliberative process privilege applies to raw data, as the raw data about PFAS levels in groundwater cannot stand on its own; the data does not have informational value in its own right but instead serves to primarily reveal the evaluative process by which different members of the decision-making chain arrived at their conclusions. DNREC maintains that your request for any raw sampling data and the related correspondence or documents should be denied. In addition, DNREC asserts that any correspondence between DNREC and its legal counsel discussing legal advice related to responding to a FOIA request is covered by the attorney-client privilege.

## DISCUSSION

The public body has the burden of proof to justify its denial of access to records under FOIA.<sup>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup> DNREC provided a response to your FOIA request in its Response. Thus, the Petition’s claim that DNREC did not respond to your request is now moot.<sup>5</sup> However, DNREC is cautioned to respond to requests within the timeframes provided in the FOIA statute.

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<sup>3</sup> 29 *Del. C.* § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>5</sup> 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 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

In addition, your Petition claims that despite this Office’s position in Attorney General Opinion No. 22-IB07, DNREC has failed to provide the raw data and the related internal correspondence in response to the most recent request and asks this Office to direct DNREC to provide these records. DNREC argues that this data and related internal correspondence should be exempt from FOIA under the deliberative process privilege. Section 10002(o)(6) permits the nondisclosure of any records exempt from public disclosure by common law. However, DNREC solely cites to federal precedent to support its argument, and we find no basis in Delaware case law to apply the deliberative process privilege in this matter as DNREC suggests.<sup>6</sup>

Accordingly, we find that DNREC violated FOIA by failing to demonstrate its withholding of access to the requested raw data and the related internal correspondence was proper under FOIA. We reiterate our recommendation stated in Attorney General Opinion No. 22-IB07 that DNREC review its records and supplement its response to you, consistent with these two opinions on the matter. We recommend that DNREC respond to you within the timeframes provided under Section 10003.

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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.”).

<sup>6</sup> *State v. Figg Bridge Engineers, Inc.*, 79 A.3d 259, 265 (Del. Super. 2013) (“Thus, the Department asks the Court to adopt, not the executive privilege as delineated in *Guy*, but a hybrid of two privileges, which would broaden the Governor’s executive privilege to include the deliberative processes of State agencies and departments. To do so would be to act without Delaware precedent, and the Court declines to do so.”); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 785 (Del. Super. 1995) (recognizing a qualified executive privilege for communications with the Governor in exercise of his power to appoint judges); *Beckett v. Trice*, 1994 WL 319171, at \*3 (Del. Super. Jun. 6, 1994) (“However, I note, as an aside, that the ‘deliberative process privilege’ does not exist in Delaware.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*12 (Del. Ch. May 19, 1994) (declining to recognize a deliberative process privilege protecting a board’s discussions about draft regulations during an executive session and stating the board’s claim “rests upon a claimed ‘deliberative process privilege’ for which no support exists in FOIA or in Delaware case law”); *Del. Op. Atty. Gen.* 16-IB11, 2016 WL 3462342, at \*5 (Jun. 6, 2016) (“Nor have Delaware courts recognized a broad-based deliberative process privilege with respect to routine agency deliberations that might allow an agency to withhold draft records. To the extent that a deliberative process privilege has been discussed by Delaware courts, the explanation of the privilege has been limited to constitutionally elected or appointed officials. . . .”) (internal citations omitted).

## **CONCLUSION**

For the foregoing reasons, we determine that the Petition's claim that DNREC failed to respond to your request is now moot and that DNREC violated FOIA by denying access to the raw sampling data and related internal correspondence under the deliberative process privilege.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

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