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

**Attorney General Opinion No. 23-IB13**

**April 20, 2023**

**VIA EMAIL**

Brian M. Rostocki  
Reed Smith, LLP  
[brostocki@reedsmith.com](mailto:brostocki@reedsmith.com)

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

Dear Mr. Rostocki:

We write regarding your correspondence alleging that the Delaware Department of Finance 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 the Department did not violate FOIA by denying access to the requested records.

**BACKGROUND**

The State Escheator has the authority to enforce the State escheats laws.<sup>1</sup> In connection with this enforcement power, the State Escheator may examine a person’s records to determine whether the person complied with Delaware escheat laws.<sup>2</sup> The State Escheator also is authorized

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<sup>1</sup> 12 *Del. C.* § 1102.

<sup>2</sup> 12 *Del. C.* § 1171 (“The State Escheator, at reasonable times and on reasonable notice, may do any of the following: (1) Examine the records of a person or the records in the possession of an agent, representative, subsidiary, or affiliate of the person under examination in order to determine whether the person complied with this chapter. Such records may include information to verify the completeness or accuracy of the records provided, even if such records may not identify property reportable to the State.”).

to contract with a person to conduct compliance reviews and examinations for unclaimed property, subject to certain limitations.<sup>3</sup>

On February 16, 2023, you requested two categories of records from the Department: 1) “any and all internal documents that reflect compliance or attempts to implement compliance with rule 12 *Del. C.* § 1178,” and 2) all documents that reflect the percentage of unclaimed property audits assigned to each auditor having an active contract with the Delaware Department of Finance in 2023.”<sup>4</sup> The request also cites to 12 *Del. C.* § 1178(a), which states “[t]he State Escheator may contract with a person to conduct compliance reviews and examinations in accordance with this chapter but no such person shall be assigned more than 50% of the number of all such compliance reviews and examinations undertaken subsequent to January 1, 2015.”<sup>5</sup> The Department responded on March 9, 2023, denying your request under 29 *Del. C.* § 10002(o)(9) which exempts “records pertaining to pending or potential litigation which are not records of any court” and under 29 *Del. C.* § 10002(o)(6) which exempts “records specifically exempted from public disclosure by statute or common law” which “may include, but is not limited to, records subject to the attorney-client privilege.”<sup>6</sup> This Petition followed.

The Petition alleges that the Department’s denial was improper. You state that Section 1178 “was enacted, at least in part, to ensure no single private company had a majority of unclaimed property enforcement contracts and to restore public confidence in the relationship between the Department of Finance and its private contractors who conduct unclaimed property audits on its behalf.”<sup>7</sup> Thus, the records you seek, which demonstrate compliance with Section 1178, are “of utmost public interest.”<sup>8</sup> Further, you contend that the Department failed to meet the burden of proof under 29 *Del. C.* § 10005 to demonstrate the requested records fall under a FOIA exemption, arguing that the Department has not identified, nor are you aware of, any litigation challenging the Department’s compliance with Section 1178, that attorney-client privilege is not applicable to the number of audits assigned to each auditor, and that your request does not seek any confidential information about the companies or targets of the audit.

The Department’s counsel responded to the Petition on the Department’s behalf (“Response”) and included an affidavit from the State Escheator. The Department first asserts that requested records are not public records, as they are records pertaining to pending and potential

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<sup>3</sup> 12 *Del. C.* § 1178.

<sup>4</sup> Petition, Ex. A. The FOIA request was submitted under your name and did not identify a client.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, Ex. B.

<sup>7</sup> *Id.*, p. 2.

<sup>8</sup> *Id.*

litigation under 29 *Del. C.* § 10002(o)(9). The Department notes that your firm represents thirteen holders<sup>9</sup> under examination<sup>10</sup> and has been involved in multiple cases representing clients against the Department in the last fifteen years. The Department identifies pending unclaimed property cases in which your law firm is representing clients against the Department, including two cases filed in the U. S. District Court of Delaware and one case filed in the Delaware Court of Chancery and describes how these cases relate to the records you seek. In those cases, the Department states you have argued that the contract auditor is a self-interested party with a financial stake in the outcome of the examinations, have sought relief in regard to the contract auditor’s practices, and have sought discovery from this same auditor and the State Escheator about the motivations for their enforcement, while reserving your right to plead additional defenses in the Court of Chancery case once legal research and analysis of the facts are complete. The Department asserts that this request is a law firm’s request made on behalf of the litigants it represents, not the request of a citizen trying to understand what the government is up to. In addition, the Department argues that the potential litigation exemption also applies to this request, as your law firm has a history of challenging the unclaimed property laws and in a separate audit, your colleague hinted at litigation. Finally, under 29 *Del. C.* § 10002(o)(6), the Department contends that the requested records are statutorily protected from disclosure pursuant to 12 *Del. C.* §1174 and 1189, as you have requested records which the State Escheator attests are “a list of companies placed under examination and the audit firm to which the examination was assigned.”<sup>11</sup> Those types of records, the Department contends, are subject to the protections of 12 *Del. C.* §1174, which provides “records obtained and records, including work papers, compiled by the State Escheator in the course of conducting an examination . . . are subject to the confidentiality and security provisions of § 1189 of this title and are not a ‘public record’ under [Delaware’s FOIA statute].”

## **DISCUSSION**

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.<sup>12</sup> In any action brought under Section 10005, the public body has the

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<sup>9</sup> 12 *Del. C.* § 1130(10) (“‘Holder’ means any person having possession, custody, or control of the property of another person and includes a post office, a depository, a bailee, a trustee, a receiver or other liquidating officer, a fiduciary, a governmental department, institution or agency, a municipal corporation and the fiscal officers thereof, a public utility, service corporation, and every other legal entity incorporated or created under the laws of this State or doing business in this State.”).

<sup>10</sup> Response, Ex. 1.

<sup>11</sup> *Id.*

<sup>12</sup> 29 *Del. C.* § 10003(a).

burden of proof to justify its denial of access to records.<sup>13</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>14</sup>

Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”<sup>15</sup> “[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>16</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>17</sup> “And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts’ rules of discovery.”<sup>18</sup> To determine if the pending litigation exemption applies, we must consider whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.<sup>19</sup>

In this case, the requesting party is a member of a law firm involved in pending litigation with the entity from which it seeks records. For the first prong, the Department identified three unclaimed property cases that are pending in front of the U.S. District Court of Delaware and the Delaware Court of Chancery involving the Department and your firm’s clients.<sup>20</sup> Thus, the first prong is satisfied.

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<sup>13</sup> 29 Del. C. § 10005(c). This burden of proof is prompted by the petition process in this matter.

<sup>14</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>15</sup> 29 Del. C. § 10002(o)(9).

<sup>16</sup> *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at \*9 (Del. Super. Aug. 18, 2016) (citation omitted).

<sup>17</sup> *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

<sup>18</sup> *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at \*3 (Del. Super. Mar. 31, 2003).

<sup>19</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).

<sup>20</sup> *See Response*, Ex. 2-6.

The second prong of this test is to determine whether the requested records pertain to the pending litigation. For this prong, we consider the relation of these requested records to this litigation, including the timing and nature of your request with respect to the pending litigation.<sup>21</sup> Having reviewed the Response and provided court records, we find that this second prong is met. In the midst of representing clients under examination in litigation with the Department and one of its contract auditors, you seek records through FOIA about the Department's compliance with the unclaimed property laws regulating the Department's delegation of examinations to its contract auditors.<sup>22</sup> As a more specific example, you presented a counterclaim in the Court of Chancery case on February 7, 2023, alleging the Department's abuse of process, in part based on the Department's relationship with the contract auditor.<sup>23</sup> In this same filing, you also requested the court's leave for discovery, including depositions of the State Escheator and the contract auditor, relating to the Department's and the auditor's intentions in pursuing the enforcement action and reserved the right to amend your pleadings.<sup>24</sup> A little over a week after making this discovery request to the court, you requested these compliance-related records from the Department through FOIA. In sum, both the timing and nature of this FOIA request indicate that this request pertains to the pending litigation. As both prongs of the test for the pending litigation exemption have been satisfied, we determine that the Department met its burden of demonstrating that it did not improperly deny access to the requested records.

## CONCLUSION

For the foregoing reasons, we determine that in these circumstances, the Department did not violate FOIA by denying access to the requested records.<sup>25</sup>

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<sup>21</sup> *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.”).

<sup>22</sup> *See* Response. The provided case records refer to the relationship between the Department and the contract auditor, including the financial aspects.

<sup>23</sup> *Id.*, Ex. 4.

<sup>24</sup> *Id.*; *see also* Ex. 6 (arguing certain Department actions are indicative of bad faith, including the claim that the “facts in this case also support a reasonable inference that Delaware may be exercising its audit authority to assist its agent, [this contract auditor], in collecting documents for other states’ audits, resulting in increased compensation for [this contract auditor].”).

<sup>25</sup> Although it is not necessary to this determination, we note that the Department provided sworn testimony that “[d]ocuments responsive to the Reed Smith LLP FOIA Request would consist of a list of companies placed under examination and the audit firm to which the examination was assigned.” Response, Ex. 1. Because 12 *Del. C.* § 1174 provides that “records obtained and records, including work papers, compiled by the State Escheator or the Secretary of State in the course of conducting an examination under § 1171 of this title” are not “public records” under FOIA, Section 1174 and 29 *Del. C.* § 10002(o)(6) also apply here, as these records would constitute

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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part of the work papers of the Department that are “records specifically exempted from public disclosure by statute or common law.”