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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB17

June 13, 2023

VIA EMAIL

Ken Grant
ken.grant7@gmail.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Grant:

We write in response to your correspondence, alleging that the City of Wilmington violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this 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. As discussed more fully herein, we determine that the City did not violate FOIA by denying access to the records you seek.

BACKGROUND

On April 10, 2023, you submitted a request to the City of Wilmington for the following data between January 2019 and January 2023, broken down by month: 1) number of vehicles towed by the City; 2) number of vehicles kept by the contracted tow company; and 3) number of tow release fees paid to the City. Two days later, you submitted a second request for data between January 2018 and January 2023, broken down by month concerning: 1) the number of boots applied to vehicles by mistake; and 2) the number of vehicles towed by mistake. The City responded to both requests on April 29, 2023, denying access to the requested records because "the records you seek pertain to pending litigation and are not records of any court."¹ This Petition followed.

¹ Petition.

This Petition states that you are aware of a lawsuit involving the City’s parking and towing practices. Booting practices, you contend, are an entirely different matter than towing, and the City’s booting practices are governed by different laws and are handled by different people and different contractors. Thus, you argue that the data you requested related to the City’s booting practices has been improperly withheld by the City.

On May 23, 2023, the City’s counsel replied to the Petition on the City’s behalf (“Response”). The City argues that the pending litigation exemption applies, pointing to pending litigation involving the City and disputing your characterization that the litigation does not relate to booting practices. To demonstrate that litigation is pending and currently in the discovery phase, the City provided the complaint and scheduling order for *Shaheed and Dickerson v. City of Wilmington* case filed in the U.S. District Court for the District of Delaware. The City also alleges that you have “substantial ties to opposing Counsel, as [you] both are or recently were member[s] of an advocacy group that recently corresponded with the City about the operation of its towing program, which is also the subject of the pending Complaint.”² The City contends that the litigation relates to the booting, or immobilization, of the vehicles in the City, in addition to the City’s towing practices. The City points out that the parking enforcement program is governed by Chapter 37, Article III of the City Code entitled “Vehicle Towing, Impoundment, and Immobilization” and that the complaint in the pending litigation seeks a declaratory judgment that the provisions of the City Code addressing immobilization are unconstitutional. Requiring public access to its litigation records would create an uneven playing field between the litigants. The City asserts that the court process grants public access, and as the case proceeds, all citizens will be provided with an opportunity to review the relevant laws and facts regarding the claims against it, without stripping the City, and the citizens it represents, of the protections afforded by the rules of discovery.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.³ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵

² Response.

³ 29 *Del. C.* § 10003(a).

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”⁶ “[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.”⁷ “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.”⁸ “And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts’ rules of discovery.”⁹ 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.¹⁰

In this case, the City provided court records regarding this pending suit in which it is a named party, so the first prong is clearly met.¹¹ The second prong of this test is to determine whether the requested records pertain to the pending litigation. For this prong, we consider the relationship between these requested records and this litigation, including the timing and nature of your request with respect to the pending litigation.¹² In this case in which discovery is on-going, the plaintiffs asserted various claims concerning the City’s parking enforcement, and the plaintiffs request the Court declare portions of Sections 37-125 and 37-131 unconstitutional and issue permanent injunctions barring the defendants’ enforcement of these provisions.¹³ These code provisions relate to the City’s parking enforcement and reference both towing followed by impoundment and immobilization to address outstanding and overdue traffic citations.¹⁴ As such,

⁶ 29 *Del. C.* § 10002(o)(9).

⁷ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

⁸ *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

⁹ *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

¹⁰ *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).

¹¹ Response, Ex. A, B.

¹² *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.”).

¹³ Response, Ex. A.

¹⁴ *Wilm. C.* § 37-125(a) (“Outstanding and overdue citations. (a) The department of public safety shall provide the license registration numbers of motor vehicles which have outstanding and overdue traffic citations issued to such motor vehicles for violations incurred under 21 *Del. C.*,

we find that the second prong is satisfied, and the City has met its burden to demonstrate that the records were properly withheld under the pending litigation exemption.¹⁵

CONCLUSION

For the reasons set forth above, we conclude that the City did not violate FOIA by denying access to the requested records.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

this chapter, any law of the state, or any ordinance of the city or other provision of this Code or regulation issued by the city government and which citations total in amount \$200.00 or more in unpaid fines and/or total in number five or more traffic citations. The amount owed in unpaid fines will be calculated in conjunction with any outstanding and overdue traffic citations issued to the owner on currently or previously owned motor vehicles. An unpaid fine will not be calculated towards immobilization and/or towing eligibility until the designated appeal window has passed. If any such vehicle is found parked on the streets of the city, it shall be towed and impounded as provided in section 37-121(a) or immobilized in such manner as to prevent its operation; provided, however, that no such vehicle shall be immobilized by any means other than by the use of a device or other mechanism which will cause no damage to such vehicle unless it is moved while such device or mechanism is in place.”); Wilm. C. § 37-131(b) (“If such immobilization and/or towing and storage charges are paid under protest, or if the fine on the violation for which the vehicle was towed or immobilized is paid under protest, the offender shall be entitled to a hearing before the municipal court for the city.”).

¹⁵ Although the pending litigation exemption test does not require examining whether the requesting party is a litigant or a party related to the litigant, we note that the City provided with its Response a copy of an April 2021 email. This email included a letter from the Wilmington Parking Coalition concerning Wilmington parking enforcement issues, and both you and the plaintiffs’ counsel signed this letter as members of the coalition.