



KATHLEEN JENNINGS  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
CRIMINAL DIVISION (302) 577-8500  
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400  
FAMILY DIVISION (302) 577-8400  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-2610

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

**Attorney General Opinion No. 23-IB22**

**August 1, 2023**

**VIA EMAIL**

Brandon Holveck  
The News Journal  
[bholveck@delawareonline.com](mailto:bholveck@delawareonline.com)

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

Dear Mr. Holveck:

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”). 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 DNREC did not violate FOIA by denying access to these requested records. However, DNREC should direct the request to the appropriate custodian of the records.

**BACKGROUND**

On June 8, 2023, you submitted a FOIA request to the Government Information Center, which then forwarded the request to DNREC. Your request seeks various documents related to the selection of the operator at the Port of Wilmington, including all bids solicited by the Diamond State Port Corporation (“DSPC”) to operate the Port, the proposed term sheet for a concession agreement regarding the Port between the DSPC and Enstructure, the concession agreement regarding the Port between GT USA Wilmington and the DSPC, and any other documents used to select an operator for the Port. DNREC denied this request pursuant to 29 *Del. C.* § 10002(o)(9), which exempts records pertaining to pending litigation. This Petition followed.

The Petition alleges that the request should be granted, as the DSPC is a public instrument of the State and the bids are of public interest, and these records should be released with redactions for any elements that relate to pending litigation. In addition, the Petition asserts the GT USA Wilmington concession agreement has been made public previously and discussed during several public meetings. You allege that the Enstructure agreement was included as a part of a resolution presented in a May 22, 2023 DSPC Board of Directors meeting. Finally, you note that your FOIA request was made to the Government Information Center and rerouted to DNREC, but perhaps the request should be fulfilled by the Department of State or the DSPC.

DNREC, through its legal counsel, replied to the Petition, enclosing the affidavit of its FOIA coordinator in support of its response. DNREC states that the DSPC is a separate and unrelated entity; however, the DSPC is undertaking construction of a new container port which requires permits from DNREC's Division of Water and Division of Waste and Hazardous Substances. DNREC's approval of the Subaqueous Lands Permit has been appealed to the Environmental Appeals Board, and these proceedings are still ongoing. DNREC therefore contends that it appropriately denied this request, because it is not the custodian of the requested records and does not have responsive records.<sup>1</sup> Even if DNREC had responsive records, DNREC maintains that the pending litigation exemption would apply to these records.

## **DISCUSSION**

The public body has the burden of proof to justify its denial of access to records.<sup>2</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>3</sup> Under FOIA, a requesting party must seek public records from the appropriate custodian of the records.<sup>4</sup> The appropriate custodian for records is generally defined as "the public body that originated the record."<sup>5</sup> In this case, the request explicitly seeks the DSPC's records. Although the Government Information

---

<sup>1</sup> We note that DNREC asserted that it is not the custodian of these records for the first time in its Response to your Petition. We respectfully caution DNREC to give due consideration to the reasons asserted in its communications with requesting parties in the future. *See, e.g., Del. Op. Atty. Gen. 22-IB16*, 2022 WL 1547876, at \*3 (Apr. 29, 2022).

<sup>2</sup> 29 *Del. C.* § 10005(c).

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

<sup>4</sup> 29 *Del. C.* § 10003(a) ("All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body."); *see also Parker v. Brady*, 2006 WL 306930, at \*2 (Del. Super. Jan. 5, 2006) ("The Attorney General does not have custody of or control over the disclosure of criminal records. Thus, the Attorney General had no duty to answer the request.").

<sup>5</sup> *Del. Op. Atty. Gen. 05-IB16*, 2005 WL 2334345, at \*6 (Jun. 22, 2005).

Center directed this request to DNREC, the DSPC is a separate entity unrelated to DNREC.<sup>6</sup> The DSPC is a membership corporation with the Department of State as the sole member.<sup>7</sup> We find that the request, as evident on its face, was not directed to the appropriate custodian, and although DNREC did not violate FOIA by denying access to these records, DNREC should refer the request to the proper custodian.<sup>8</sup> We recommend that DNREC contact the DSPC or the Department of State to have your request properly directed.

### CONCLUSION

For the foregoing reasons, we determine that DNREC did not violate FOIA by denying access to the requested records.

Very truly yours,

/s/ Alexander S. Mackler

---

Alexander S. Mackler  
Chief Deputy Attorney General

cc: Kayli Spialter, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

---

<sup>6</sup> 29 *Del. C.* § 8001 (“A Department of Natural Resources and Environmental Control is established and shall have, in addition to the other powers, duties and functions vested in the Department by this chapter, the power to perform and shall be responsible for the performance of all the powers, duties and functions heretofore vested in the Highway Department pursuant to Chapter 45 of Title 7.”); 29 *Del. C.* § 8780 (“The General Assembly declares the following to be the policy and purpose for creation of the Diamond State Port Corporation: . . . (2) That it is in the best interest of the State to create a corporate entity which shall assume, by agreement, operation of the Port of Wilmington and its related facilities and to assume certain obligations of the City of Wilmington.”).

<sup>7</sup> 29 *Del. C.* § 8781 (“The Corporation shall be a membership corporation with the Department of State as sole member and shall have a certificate of incorporation and by-laws consistent with this subchapter.”).

<sup>8</sup> 8 *Del. Admin. C.* § 900-3.3.2 (“Without limitation, if a Requesting Party initiates a FOIA Request that would more appropriately be directed to another agency, the FOIA Coordinator shall promptly forward such request to the relevant agency and promptly notify the Requesting Party that the request has been forwarded. “).