



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-IB26

September 18, 2023

VIA EMAIL

Dwayne Bensing, Legal Director
American Civil Liberties Union of Delaware
dbensing@aclu-de.org

RE: FOIA Petition Regarding the City of Wilmington

Dear Director Bensing:

We write in response to your correspondence filed on behalf of the American Civil Liberties Union of Delaware (“ACLU”), 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 has not violated FOIA by denying access to the requested records pursuant to the pending litigation exemption.

BACKGROUND

The ACLU submitted a multi-part FOIA request to the City dated June 21, 2023 seeking twenty categories of records related to Operation Safe Streets (“OSS”) and the Governor’s Task Force (“GTF”), including presentation materials regarding OSS and/or GTF presented to the Criminal Justice Council by the City police department, City police records identifying measurable objectives and/or goals for OSS and GTF since January 2018, reports made by the City police regarding OSS and GTF to the Criminal Justice Council since January 2018, a map of City’s OSS and GTF patrol areas and any information regarding criteria to prioritize these areas, reports and statistical materials made by City police about OSS and/or GTF, guidance issued to City’s OSS and GTF officers, including any handbooks, manuals, workbooks, and diagrams, and criteria

for selection as an OSS or GTF officer. The City responded on August 8, 2023, providing some materials, referring some items, and denying the above-referenced items pursuant to the pending or potential litigation exemption under 29 Del. C. § 10002(o)(9). This Petition followed.

The Petition alleges that the City improperly denied the requests for the above-referenced items under the pending litigation exemption. The ACLU attached a copy of the pending federal district court case that the City cites as the basis for invoking the pending litigation exemption. The ACLU asserts that it is not a party to the case, and to its knowledge, this case has not advanced to the pleading stage. Despite the fact that a study conducted by the ACLU is referenced in the complaint, the ACLU states it was wholly unaware of the case until the City mentioned it in connection with this FOIA request. While the ACLU acknowledges that this Office previously interpreted the pending litigation exemption to apply when the requesting party is not a party to the litigation, the ACLU argues that the records it seeks do not have a “clear nexus” to this suit for damages filed against OSS officers.

The City’s counsel replied to the Petition on August 28, 2023 (“Response”), contending its responses to these items were appropriate. A week before the ACLU’s request, the City received this complaint in federal district court from a *pro se* plaintiff, alleging City police officers violated this individual’s civil rights. The complaint describes OSS as a failed police operation and alleges that the City failed to train, supervise, and terminate officers in the OSS program. The complaint quotes ACLU’s October 2022 article entitled “Operation ‘Safe’ Streets: How Delaware’s Most Secretive Police Force Plays Fast & Loose With Our Communities.”¹ The City contends that pending litigation applies to these requests, because the City is a principal party to pending litigation; there is a clear nexus between the records sought and the litigation; and the records are not records of any court. To find otherwise, the City claims “would unfairly disadvantage the City (and other public body) in litigation matters as it would be forced to publicly disclose records under the broad parameters of FOIA that would otherwise be governed by the rules of discovery.”² Once records are provided, the City states it no longer has the control of the records, and it is important to preserve the City’s potential objections to discovery. Although the complaint seeks monetary relief, the City asserts that the plaintiff’s claim can include municipal liability and requires a thorough analysis of records relevant to the administration of OSS. The City points out that the records ACLU seeks overlap in time with the complaint’s allegations and may be used to “establish whether there is an official policy, practice or custom, or whether the City has been deliberately indifferent, and whether said policy[,] practice, or custom is the moving force behind a violation of a constitutional right.”³ Further, the City points out that the plaintiff is still free to amend his complaint at this time.

¹ Response, p. 1.

² *Id.*, p. 2.

³ *Id.*, p. 4.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.⁴ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”⁷ 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.⁸

In this case, the first prong is satisfied, as the record establishes that the City is a named party in pending litigation.⁹ We next must 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 the requests with respect to the pending litigation.¹⁰ This complaint involves an individual who was pulled over and arrested by OSS officers and includes a claim that the City “as a matter of policy and practice, failed to discipline, train, supervise or otherwise sanction [the involved police officers] who have violated the rights of citizens by unlawfully arresting and maliciously prosecuting dozens of citizens, including the plaintiff[], in the failed police operation ‘Operation Safe Streets’”¹¹ This claim quotes the ACLU’s October 2022 article about OSS and past OSS officer incidents cited therein. During the suit’s initial stages, the ACLU requested records aimed at the OSS program and practices, which is the cornerstone of one of the complaint’s claims. As such, we find that the second prong is satisfied, and the City has met its burden to demonstrate that the records are exempt under the pending litigation exemption.

⁴ 29 Del. C. § 10003(a).

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 Del. C. § 10002(o)(9).

⁸ *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).

⁹ Petition.

¹⁰ *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.”).

¹¹ Petition.

CONCLUSION

For the reasons set forth above, we conclude that that the City has not violated FOIA by denying access to the requested records pursuant to the pending litigation exemption.

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