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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB06

February 5, 2024

VIA EMAIL

Joelle E. Polesky
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Michael D. O'Mara
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RE: FOIA Petition Regarding the Diamond State Port Corporation

Dear Ms. Polesky and Mr. O'Mara:

We write in response to your correspondence, on behalf of your client, Holt Logistics Corporation ("Holt"), alleging that the Diamond State Port Corporation ("DSPC") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("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 DSPC's response was not procedurally deficient; the DSPC did not violate FOIA by denying access to the requested records under the pending and potential litigation exemption, except for the tenth and eleventh items in the request. The DSPC did not meet its burden of proof with respect to the tenth and eleventh items and violated FOIA with respect to those two items. Additionally, we determine that an award of attorneys' fees and costs cannot be made in this FOIA petition process.

BACKGROUND

On October 5, 2023, you submitted a request to the DSPC on Holt's behalf seeking the following records:

1. The Concession Agreement between Diamond State Port Corporation (“DSPC”) and GT USA Wilmington, LLC (“GT Wilmington”) entered into in or about 2018 with regard to the Port of Wilmington (the “GT Concession Agreement”).
2. All amendments to the GT Concession Agreement.
3. Documents reflecting approval by DSPC of GT Wilmington’s use of the GT Concession Agreement as collateral for any loans or letters of credit.
4. The Concession Agreement (or similar lease/operating agreement) between DSPC and Enstructure, LLC (“Enstructure”) (or any entities related to or affiliated with Enstructure) entered into in or about 2023 with regard to the Port of Wilmington (the “Enstructure Concession Agreement”).
5. All amendments to the Enstructure Concession Agreement.
6. The DSPC bylaws.
7. All DSPC Board of Director meeting notices from January 1, 2018 to date.
8. All DSPC Board of Director meeting agendas from January 1, 2018 to date.
9. All DSPC Board of Directors meeting minutes from January 1, 2018 to date.
10. All meeting minutes of the subcommittee of the DSPC Board of Directors charged with oversight and/or evaluation of the 2023 bid process for a new operator/concessionaire for the Port of Wilmington (the “Bid Subcommittee”).
11. Documents sufficient to identify the members of the Bid Committee, including any *ex officio* members.
12. Documents sufficient to identify all persons or entities that submitted bids in connection with the 2023 bid process for a new operator/concessionaire for the Port of Wilmington.
13. Documents reflecting the use of American Rescue Plan Act (“ARPA”) funds for the benefit of the Port of Wilmington.
14. Documents reflecting any intent to use ARPA funds for the benefit of the Port of Wilmington.
15. Any approvals by DSPC (or other state agency), or requests for approvals submitted to DSPC (or other state agency), relating to the “existence of a scrap tire operation at the location of 104 Hay Road, Wilmington, Delaware,” as referenced in Order No. 2022-WH-0009, dated June 23, 2022, issued by Secretary Garvin of the State of Delaware Department of Natural Resources and Environmental Control (the “Tire Order”), a copy of which is attached as **Exhibit A**.
16. Documents reflecting the investigation into the “existence of a scrap tire operation at the location of 104 Hay Road, Wilmington, Delaware,” as referenced in the Tire Order.
17. All documents submitted by the Respondents, GT Wilmington and S & A Marketing Company, Inc., in response to, and/or as required by, the Tire Order.¹

¹ Petition, Ex. C (emphasis in original).

The DSPC replied, stating that the document responsive to your first request was available online, noting certain redactions had been made pursuant to 29 *Del. C.* § 10002(o)(1), (2), and (8). In addition, the DSPC noted that documents responsive to the seventh, eighth, and ninth requests are available on the DSPC website. For the balance of the requests, the DSPC asserted that the pending or potential litigation exemption in 29 *Del. C.* § 10002(o)(9) applied, due to the DSPC and certain entities related to Holt being parties to an appeal pending in front of the Environmental Appeals Board (“EAB”) and the litigation hold notice sent on behalf of Holt to the DSPC on August 11, 2023 regarding other potential claims.

In the Petition, Holt first alleges that the DSPC’s response is procedurally deficient, as other than referencing the EAB appeal and litigation hold, no further facts are provided, and the facts provided are unsworn. Second, the Petition asserts the DSPC’s assertion of the pending or potential litigation exemption is inadequate, because the EAB appeal has no nexus to this FOIA request. Holt argues that it is not a party to that particular appeal and even if it was, the DSPC failed to identify which party is related and why that is relevant grounds to deny the request. In addition, Holt contends that the records it seeks – documents in connection with the Concession Agreement, rejection of Holt’s bid in connection with, and the award to Enstructure of, the assignment and amendment of the Concession Agreement – are not relevant to the issue in the appeal; the EAB appeal is about the permitting issues for the proposed expansion of the Port of Wilmington. Third, Holt claims that the DSPC’s response violates the policy of transparency that is advanced by the FOIA statute. Holt argues that reliance on the litigation hold that it sent to the DSPC is misplaced, as the hold is nothing more than asking the DSPC to retain materials that could be discoverable in litigation that has not yet been initiated and that potential litigation should not encompass unrealized or idle threat of litigation. As the DSPC responded to Holt’s August 11, 2023 litigation hold with one of its own, Holt contends a public body should not be permitted to preclude access to public records by issuing a litigation hold itself. Finally, Holt claims it is entitled to attorneys’ fees and costs incurred in this matter pursuant to Section 10005(d). The Petition does not raise any claims with respect to the items for which the DSPC provided responsive records.

On January 16, 2024, the counsel for the DSPC replied to this Petition on the DSPC’s behalf (“Response”) and attached the affidavit of the Executive Director of the DSPC. The affidavit states that the DSPC is a state-chartered corporation that owns the Port of Wilmington, and upon the Executive Director’s information and belief, the former port operator’s reconstituted board engaged in a process to seek financing to fulfill its obligations under the Concession Agreement or alternatively, to select a new port operator. The affidavit provides sworn statements that Holt or its affiliated companies operate port facilities that are in competition with the Port of Wilmington and that Holt participated in the former port operator’s reconstituted board’s process to seek financing to fulfill its financial obligations or to select a new port operator but was not ultimately selected; Enstructure was chosen to be assigned the Concession Agreement. Since that time, the Executive Director attests that Holt and its affiliated entities have lodged many complaints and objections to the expansion of the port and the selection of the operator. The DSPC received the August 11, 2023 litigation hold notice from one attorney representing Holt in this Petition. This notice indicated that Holt was investigating a “potential legal action” regarding the selection of a bidder by DSPC, the procedures governing the bid, and the extent to which this process and award ran afoul of Delaware law and notified the DSPC to preserve and maintain various records related to this potential action, including documents related to the former

operator's issues and the selection and evaluation of the new operator, and meeting materials since 2018.² Based on this, the DSPC states it reasonably anticipated litigation from Holt and responded with its own litigation hold notice about ten days later.

To support its assertion of the pending or potential litigation exemption in its Response, the DSPC submitted descriptions of the nexus between the pending or potential litigation and each of the seventeen items in Holt's request, other than the first, seventh, eighth, and ninth items, which the DSPC states are not part of this Petition. For the remaining items, the DSPC argues that each is exempt pursuant to Section 10002(o)(9), as each item relates to the potential litigation cited in the litigation hold notice and/or to the pending EAB appeal. The DSPC asserts that the litigation hold notice is sufficient evidence that litigation is likely or reasonably foreseeable, and sending its own litigation hold notice is merely evidence of the DSPC's concern that litigation was likely and foreseeable. The DSPC states that the three items related to the tire operations pertain to the pending EAB appeal in which entities owned by Holt are involved. The DSPC also points out that following the submission of this request, two entities owned by Holt filed suit in federal district court seeking to vacate the permits and approvals and to enjoin any activities in furtherance of constructing the new marine terminal. Additionally, the DSPC states that the three requests about the tire operations also relate to the potential litigation, as the litigation hold notice encompasses records pertaining to the former operator's failure to perform the Concession Agreement, and this Concession Agreement with the former operator required it to remedy the scrap tire issues.

In addition to the pending or potential litigation exemption, the DSPC claims that the term "citizen" in Delaware's FOIA statute has been construed to disallow attorneys or others acting in a representative capacity to challenge denial of a FOIA request, because they are not making the requests in their own individual capacity as a citizen of Delaware. Here, whether Holt or its attorneys are challenging this request, the DSPC maintains that neither is a citizen of Delaware with standing.³ Additionally, the DSPC also states although it was not required to perform a search when the responsive records were exempt on its face, if a search was performed, additional exemptions, such as executive session records and 29 *Del. C.* § 10002(o)(2) and (6) to include the draft document exception, attorney-client privilege, and attorney work product, would apply. Finally, the DSPC states that this Office lacks the requisite statutory authority to award the attorneys' fees and costs in this matter.

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

² *Id.*, Ex. A.

³ While we have decided to issue a determination here as a courtesy, we feel compelled to note that you and your client, Holt, may lack standing to avail yourself of the provisions contained in Section 10005, including the petition process set forth in Section 10005(e).

⁴ 29 *Del. C.* § 10003(a).

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

In its first claim, Holt alleges that the response to the request provided by the DSPC is procedurally insufficient, as the citation to the pending or potential litigation exemption failed to provide the sworn factual support for the denial. When responding to a request, FOIA requires the public body to indicate the reasons for the denial.⁷ This Office previously determined that while public bodies are encouraged to include details when denying access to records, citation to the pending or potential litigation exemption in a denial meets the minimum requirements under Section 10003.⁸ The requirement for a detailed rationale discussed in the *Judicial Watch v. University of Delaware* case is not applicable to a response to a FOIA request; this requirement is triggered when the public body is challenged in an action under Section 10005.⁹

The DSPC asserts that both pending and potential litigation exemptions pertain to this request. Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”¹⁰ 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.¹¹ The DSPC asserts that the pending litigation exemption precludes access to the three items in the request related to the tire operations. In this case, the first prong is satisfied, as the DSPC provided evidence of the

⁵ 29 Del. C. § 10005(c).

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

⁷ 29 Del. C. § 10003(h)(2) (“If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial.”).

⁸ *Del. Op. Att’y Gen.* 20-IB05, 2020 WL 719669, at *3 (Jan. 23, 2020).

⁹ 29 Del. C. § 10005(c) (“In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.”); *Judicial Watch*, 267 A.2d at 1012 (“Thus, we hold that unless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”).

¹⁰ 29 Del. C. § 10002(o)(9).

¹¹ *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).

appeal in front of the Environmental Appeals Board challenging the DNREC Secretary's Order regarding the construction of the new commercial marine terminal facility.¹²

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.¹³ This pending appeal challenges the approval of the DSPC's application for a subaqueous lands permit, which is part of the permits and approvals required for constructing a new marine terminal facility on Hay Road, and Holt seeks records related to the approvals or requests relating to the existence of a tire operation on Hay Road, investigatory records of this operation, and submissions of the former port operator or S&A Marketing related to this environmental order. The DSPC points out that "a lack of compliance with environmental laws and orders could be used by Holt's affiliates" in this appeal, because the action ultimately challenges the permits and approvals issued to the DSPC to construct a new commercial marine facility on the Delaware River.¹⁴ Consistent with Attorney General Opinion 24-IB04, we determine these requested records may be brought to bear on the pending EAB appeal.¹⁵ Additionally, although we need not specifically determine whether Holt or any related entities are litigants in the pending appeal, this factual record indicates that Holt owns two of the appellants in this EAB appeal, and Holt is seeking these records in the midst of the pending appeal.¹⁶ When litigants seek records under FOIA to advance their litigation, Delaware courts have rejected this practice, stating that these litigants are not doing so to advance the public's right to know, but to advance their own personal stake in litigation, and they "will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure."¹⁷ As such, we find that the second prong is satisfied, and the DSPC has met its burden to demonstrate that the records are exempt under the pending litigation exemption.

¹² Response, Ex. F; *Del. Op. Atty. Gen.* 21-IB20, 2021 WL 4351857, at *2 ("This Office considers quasi-judicial proceedings litigation for the purposes of applying Section 10002(o)(9), including the 'proceedings of administrative bodies that in essence determine legal rights outside the traditional court of law.' This Office has previously determined that an appeal before the Environmental Appeals Board qualifies as pending litigation and consistent with this precedent, we find that this appeal before the Environmental Appeals Board qualifies as pending litigation.") (internal citations omitted).

¹³ *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.").

¹⁴ Response, p. 14.

¹⁵ Holt filed a separate petition against DNREC regarding a FOIA request that Holt submitted on the same day for the same type of records sought in the fifteenth, sixteenth, and seventeenth items that are the subject of this Petition. *See Del. Op. Att'y Gen.* 24-IB04 (Jan. 29, 2024).

¹⁶ Response, Ex. B, F; Response, n. 35-38.

¹⁷ *See, e.g., Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003).

Regarding the potential litigation exemption, governments always face some threat of suit, and construing “potential litigation” to include “an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].”¹⁸ To address this dynamic, the Superior Court of Delaware has adopted this Office’s two-prong test for the potential litigation exemption: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”¹⁹ “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”²⁰ These signs may include a “written demand letter in which a claim is asserted, or action is demanded, [which] may give rise to a proper inference that litigation will soon follow.”²¹ Other indicators may include prior litigation between the parties, proof of ongoing litigation with similar claims, or retention of legal counsel with respect to the claim at issue and expression of an intent to sue.²²

In this case, we believe that the litigation hold notice that Holt sent to the DSPC satisfies the first prong, as it indicates that Holt retained counsel with respect to the claims at issue and is a clear indicator that litigation is likely or reasonably foreseeable. Regarding the second prong, a clear nexus between the requested records and the potential litigation exists, as Holt sought through this FOIA request various records related to the Concession Agreement with the former port operator, the selection process for the new port operator, the rejection of Holt’s proposal, the use of certain funding at the Port, and the award to Enstructure. The litigation hold notice identifies matters within the scope of the request – the selection of operator to amend the Concession Agreement, the process of selecting an operator, including the rejection of bidders and the extent the process ran afoul of Delaware law – as the subject of the potential litigation and requests a wide-ranging scope of related records be preserved. The notice requests preservation of many Port-related records, including those related to the former operator’s performance or failure to perform under the Concession Agreement, documents about engaging other entities in this selection process, communications with those entities involved in the selection process, submissions from bidders related to the selection, communications with the chosen operator, Enstructure, and DSPC meeting materials. The identified list of records in the litigation hold was deemed non-exhaustive, and the DSPC was asked to preserve all records relevant to the potential action.

However, we do not believe that the DSPC has provided a sufficient basis to determine whether the tenth and eleventh items seeking certain records regarding the DSPC Board of Directors’ committee with oversight of the selection process were properly withheld. The tenth

¹⁸ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (citation omitted).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

and eleventh items sought the meeting minutes and records that identify the committee members. Section 10004(f) of FOIA requires public bodies to “maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record.” The minutes must include a record of the members present, and a record, by individual members of each vote taken and action agreed upon. “Such minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”²³ To meet its burden to justify the denial of access to records, the DSPC must provide the supporting facts under oath, as it is not clear on their face whether the subject records in the tenth and eleventh items are subject to FOIA.²⁴ The DSPC did not provide the requisite sworn factual basis.

As such, we find that the DSPC failed to provide a basis upon which we could determine whether this committee is a public body that is subject to FOIA’s open meeting requirements, and thus, whether the DSPC would be required to make any records responsive to the tenth and eleventh items open for public inspection and copying as provided in Section 10004(f). The DSPC must specify whether this committee is a public body under Section 10002(k), and if it is a public body, the DSPC must produce the relevant committee meeting minutes subject to any appropriate redactions, but excluding any executive session minutes that qualify for the exception in Section 10004(f).²⁵ As remediation for this violation, it is recommended that the DSPC process the tenth and eleventh items as a new request and provide a response in conformance with the FOIA statute and this Opinion.

With respect to Holt’s final claim, we determine that the request for attorneys’ fees and costs is not applicable in this petition process. Section 10005(d) expressly permits a “court” to award attorneys’ fees and costs in certain circumstances; this Office lacks such authority in the FOIA petition process.

²³ 29 Del. C. § 10004(f).

²⁴ See n. 9 *supra*; *Judicial Watch*, 267 A.2d at 1010-11 (“Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.”).

²⁵ 29 Del. C. § 10004(f).

CONCLUSION

For the reasons set forth above, we conclude that the DSPC's response was not procedurally deficient as alleged and the DSPC did not violate FOIA by denying access to the requested records under the pending or potential litigation exemption, except the tenth and eleventh items. The DSPC did not meet its burden of proof with respect to the tenth and eleventh items in the request and is in violation of FOIA with respect to those two items. This Office lacks the authority to award attorneys' fees and costs in connection with this Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Katherine H. Betterly, Attorney for Diamond State Port Corporation