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

**Attorney General Opinion No. 24-IB10**

**February 21, 2024**

**VIA EMAIL**

Joshua B. Carter  
[jbc98925@gmail.com](mailto:jbc98925@gmail.com)

**RE: FOIA Petition Regarding the City of Dover**

Dear Mr. Carter:

We write in response to your correspondence alleging that the City of Dover 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 find that the City violated FOIA by failing to meet its burden to justify the denial of access to the requested records. We determine that no violation occurred with respect to the remaining claims in the Petition.

**BACKGROUND**

On December 7, 2023, you submitted a FOIA request to the City seeking various records related to your attendance of the City of Dover Municipal Police Academy:

I attended the Dover Municipal Police Academy from 10/8/2023 to 11/28/2023. I am requesting ALL body camera footage from any staff at the academy that involves myself. The three TAC officers were Master CPL. W. Johnson, CPL. Hudson, and PFC Burton of the Dover Police Department. I am also requesting the two camera videos that Master CPL Johnson took of my baton fight and the video he took of the entire class during the OC Spray training. I want ALL correspondence between the Dover Municipal Police Academy and the Town of Dewey Beach/Dewey

Beach Police Department including emails and documentation concerning myself. I also want to see any notes/documentation/performance evaluations/grades concerning myself kept by the Dover Police Department /Dover Municipal Police Academy including those pertaining to any meetings. Known body camera dates: Monday November 27, 2023 / Thursday November 9th / Monday October 9th. OC Spray: Wednesday November 22, 2023 /Baton: Friday November 17th, 2023.<sup>1</sup>

On December 21, 2023, the City Clerk's Office sent an email stating additional time was needed to complete the response, as legal advice was needed. The City estimated being able to provide a preliminary response and invoice for the costs by January 20, 2024. On January 21, 2024, you followed up regarding the request. On January 22, 2024, a Dover officer sent you a link to upload responsive records. The City Clerk's Office also sent an email noting that you had been provided this link. That same day, you replied that this link, with three body camera videos and two internal documents, did not include all the records you requested. You stated that the City owed you an additional response outlining the reasons that the other records were denied. Among the records you allege are missing are grades, certain evaluations, the class O.C. spray video, the baton test video, the correspondence with the Town of Dewey Beach, and any notes or write-ups you received while in the academy. On January 23, 2024, the City officer sent another link to download a zip file. This response also stated that the federal FOIA "Exemption 7" applies, which exempts records compiled for law enforcement purposes that would disclose techniques and procedures for law enforcement investigations or prosecutions and that could be reasonably expected to endanger the life or physical safety of an individual. This Petition followed.

In the Petition, you allege that the City failed to release documents in a timely manner and failed to fulfill the entirety of your request. You believe that other requested records must exist and assert that the City has failed to provide you with at least seven records. Additionally, you allege that the cited law enforcement exemptions do not apply to the records you requested. You contend that as a public body, the City is bound to provide redacted documents if some of the materials meet FOIA exemptions and the City has ignored your requests. You assert that the City has not provided a formal letter or email citing the specific material that is exempt or redacted.

On January 31, 2024 and February 1, 2024, the Town's counsel replied on its behalf to the Petition (collectively, "Responses").<sup>2</sup> The City asserts that you seek these records for the purposes

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<sup>1</sup> Petition (quoted in original format).

<sup>2</sup> The City's counsel submitted three submissions in response to this Petition. The first Response from the City Solicitor indicated that the requested information would be released. The second Response from the attorney representing the City Police Department indicated that there had been an error; the records are not appropriate for release, as they are exempt under the pending or potential litigation exemption. The City requested a delay in issuing the opinion to allow the parties to work out a resolution. The third Response from the City Solicitor joined this second Response's request for an extension. You objected to the extension. The extension was declined. For this Opinion, we accept the City's most recent position as reflected in its February 1, 2024 Responses.

of potential litigation, and the pending or potential litigation exemption in 29 *Del. C.* § 10002(o)(9) applies to the remaining records. The City asserts that FOIA is not a tool to circumvent a court’s discovery process, in which the materials requested could be subject to a court-imposed protective order to safeguard public and personal safety.

## DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.<sup>3</sup> In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.<sup>4</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>5</sup> As the City provided a response, the Petition’s timeliness claim is now moot.<sup>6</sup>

The Petition also asserts that the City was required to send a formal letter citing the specific material redacted in response to the request. FOIA does not require a response to a request to be issued in the format of a formal letter, nor is a public body required to produce an index, or any other compilation, as to each record or part of a record denied.<sup>7</sup> As such, we do not find a violation of FOIA in this regard.

Finally, the Petition alleges that the remaining records were improperly withheld. The City asserts that the records that were not produced are exempt under 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].”<sup>8</sup> 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

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<sup>3</sup> 29 *Del. C.* § 10003(a).

<sup>4</sup> 29 *Del. C.* § 10005(c).

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

<sup>6</sup> See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at \*2 (Jun. 7, 2018); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at \*2 (Del. Ch. July 27, 1998)).

<sup>7</sup> 29 *Del. C.* § 10003(h).

<sup>8</sup> *ACLU v. Danberg*, 2007 WL 901592, at \*4 (Del. Super. Mar. 15, 2007) (citation omitted).

litigation.”<sup>9</sup> “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</sup> The Responses merely asserted the potential litigation exemption without providing evidentiary support to the meet this standard. As such, we find that the City did not meet its burden of proof and determine a violation occurred in this regard. We recommend that the City review its records and supplement its response to your request, in accordance with this Opinion and the FOIA statute, including the timeframes set forth in Section 10003.

### CONCLUSION

Based on the foregoing, we conclude that the City violated FOIA by failing to meet its burden to justify the denial of access to the requested records. We determine that no violation occurred with respect to the remaining claims in the Petition.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: Nicholas H. Rodriguez, City Solicitor  
Mark A. Denney, Jr., Attorney for the City of Dover Police Department

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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

<sup>12</sup> *Id.*