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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB18

May 7, 2024

VIA EMAIL

Shannon Marvel McNaught
shannon.marvel@doverpost.com

RE: FOIA Petition Regarding Sussex County

Dear Ms. McNaught:

We write in response to your correspondence alleging that Sussex County violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("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 determine that the County has not violated FOIA by denying access to the requested records.

BACKGROUND

You submitted a FOIA request to Sussex County on March 18, 2024, seeking "any and all documents and other media related to violations on property bordering Silver Lake in Rehoboth Beach this year."¹ The County denied access to these records pursuant to 29 *Del. C.* § 10002(o)(3), providing a detailed explanation from its legal counsel that the requested records are part of investigatory files compiled for civil or criminal law enforcement purposes. This Petition followed.

In the Petition, you contest the propriety of the County's response to your request, as a notification of violation is not an investigative document; it is a statement of facts. You also point

¹ Petition.

out that the Delaware Department of Natural Resources and Environmental Control provides notices of violation without a FOIA request and Delaware courts provide warrants without a FOIA request. Additionally, you allege that the U.S. Army Corps of Engineers, not the County, is conducting the investigation of this property.

On April 18, 2024, the County, through its legal counsel, replied to the Petition and provided the affidavit of the Sussex County Director of Planning and Zoning (“Response”). The County asserts that notwithstanding any investigation conducted by the U.S. Army Corps, the County also is investigating this matter. In the submitted affidavit, the Director attests that the “Planning and Zoning Department is involved in an ongoing investigation of the property Petitioner identified in her March 18, 2024 [request], and referenced in her Petition,” and as you specifically seek records pertaining to the investigation, “the documents contained in the file are not deemed public records subject to disclosure under FOIA as they are part of an investigatory file.”² The County states the court’s practices are not relevant, as the courts are not subject to FOIA, and that DNREC’s practices are also inapplicable, as another agency’s actions are not relevant in determining whether a violation of FOIA occurred in this matter.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.³ 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 As an initial matter, we agree that the actions of other entities do not impact this determination.⁶

The County asserts that the investigatory files exemption in Section 10002(o)(3) applies, which exempts “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.” The County provided an affidavit from the Director of Planning and Zoning, who attests to having the knowledge and authority to execute the affidavit. The Director states under oath that the Department is conducting an ongoing

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).

⁶ *Del. Op. Att’y Gen.* 22-IB36, 2022 WL 8067856, at *2 (Sept. 30, 2022).

investigation of the subject property,⁷ and this request seeks the records in the investigatory file.⁸ As such, the County appropriately invoked the investigatory files exemption in response to this request, and no violation of FOIA is found.

CONCLUSION

For the foregoing reasons, we conclude that the County did not violate FOIA by declining 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: J. Everett Moore, Jr., Sussex County Attorney

⁷ The Sussex County Planning and Zoning Department has law enforcement responsibilities associated with County zoning. Sussex Cty. C. § 115-228, 229.

⁸ Response.