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

**Attorney General Opinion No. 24-IB31**

**August 12, 2024**

**VIA EMAIL**

Ken Grant  
[ken.grant7@gmail.com](mailto:ken.grant7@gmail.com)

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

Dear Mr. Grant:

We write in response to your correspondence, alleging that the City of Wilmington 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 City did not violate FOIA by denying access to the requested records.

**BACKGROUND**

On July 8, 2024, you submitted a request to the City of Wilmington for the following:

1. Number of Parking tickets issued by the city of Wilmington between January 1, 2016 and March 31, 2024 –broken down by month
2. Number of Appeals filed for parking tickets issued by the city of Wilmington between January 1, 2016 and June 30, 2024 – broken down by month
3. Number of Appeals granted by the city of Wilmington between January 1, 2016 and June 30, 2024 – broken down by month
4. Number of Appeals denied by the city of Wilmington between January 1, 2016 and June 30, 2024 – broken down by month

5. Number of OFFICE OF CIVIL APPEALS REQUEST TO SCHEDULE COURT HEARING forms filed with the city of Wilmington between January 1, 2016 and June 30, 2024
6. Number of vehicles booted by the city of Wilmington between January 1, 2016 and June 30, 2024 - broken down by month
7. Number of vehicles towed by the city of Wilmington between January 1, 2016 and June 30, 2024 - broken down by month
8. Number of vehicles released by the city of Wilmington following a tow between January 1, 2016 and June 30, 2024 - broken down by month.<sup>1</sup>

The City denied access to the requested records because “[u]nder FOIA, ‘records pertaining to pending or potential litigation which are not records of any court’ are excluded from the definition of ‘public record.’”<sup>2</sup> This Petition followed.

This Petition alleges that a June 21, 2024 news article stated that the parties in the pending lawsuit alleging that the City’s towing practices are unconstitutional have reached a tentative settlement. Because you believe a written settlement indicates that the litigation is no longer pending or potential, you argue that the information you seek should be disclosed.

On July 23, 2024, the City’s counsel replied to the Petition on its behalf (“Response”), enclosing copies of relevant court records to support its allegations. The City argues that the records you seek are exempt from FOIA, because the pending litigation exemption under Section 10002(o)(9) applies. The City argues that the two-part test for this exemption is satisfied, as the City is a party to pending litigation and the records you seek pertain to this pending litigation. The City contends that although the parties have reached an agreement in principle for a settlement, the *Shaheed v. City of Wilmington* case filed in the U.S. District Court for the District of Delaware continues to be pending. To permit the parties to draft and execute a final settlement agreement and to enact the agreed-upon legislation as a part of the resolution, the parties requested that the court adjourn their existing trial date, including the dates for the joint final pretrial order and conference, for approximately six months. The City states that the court granted this adjournment, and the trial was rescheduled for January 2025. The City asserts a final, formal settlement agreement has not yet been executed, and the agreed-upon legislation has not yet been enacted. In addition, the City maintains that these requested records relating to vehicles towed, impounded, and immobilized and vehicles released by the City pertain to this pending *Shaheed* case. Although the due process claims regarding the ticketing, appeals, and release of vehicles were dismissed, these claims are subject to appeal. Thus, the City contends that this information you requested pertains to this litigation.

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

## DISCUSSION

In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.<sup>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup> FOIA requires that public records be open to inspection and copying during regular business hours and that citizens be provided reasonable access to and reasonable facilities for copying of public records.<sup>5</sup> Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”<sup>6</sup> 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.<sup>7</sup>

In this case, the City satisfied this first prong, as the City provided court records regarding this pending *Shaheed* suit in which it is a named party, demonstrating that this pending litigation has not yet resolved, as the trial is postponed.<sup>8</sup> The second prong of this test is to 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 your request with respect to the pending litigation.<sup>9</sup> Here, you seek information regarding parking ticket issuances, appeals, towing, booting, and release of vehicles, while this case, involving a challenge to the City’s parking enforcement program, is pending. Consistent with our findings in Attorney General Opinion No. 23-IB17, we find that this pending litigation relates to the records you have requested.<sup>10</sup> As such, we find that the second prong is satisfied, and the City has met its burden to demonstrate that the records were properly withheld under the pending litigation exemption.<sup>11</sup>

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<sup>3</sup> 29 *Del. C.* § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>5</sup> 29 *Del. C.* § 10003(a).

<sup>6</sup> 29 *Del. C.* § 10002(o)(9).

<sup>7</sup> *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).

<sup>8</sup> Response, Ex. 3, 4.

<sup>9</sup> *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.”).

<sup>10</sup> 2023 WL 4165965, at \*2 (Jun. 13, 2023).

<sup>11</sup> Although the pending litigation exemption test does not require examining whether the requesting party is a litigant or a party related to the litigant, we note that in Attorney General

**CONCLUSION**

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

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: John D. Hawley, Assistant City Solicitor

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Opinion No. 23-IB17, which also concerned you and the City, the City provided an email showing you and the plaintiffs' counsel were members of the same coalition addressing City parking enforcement matters.