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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB33

August 15, 2024

VIA EMAIL

Karl Baker
kbaker@spotlightdelaware.org

RE: FOIA Petition Regarding the State of Delaware Office of Pensions

Dear Mr. Baker:

We write regarding your correspondence alleging that the State of Delaware Office of Pensions (“Pension Office”) violated the Delaware 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 find that the Pension Office did not violate FOIA by denying access to the requested records.

BACKGROUND

On May 30, 2024, you submitted a request to the Pension Office for “email records sent in the year 2024 that show the Office of Pension’s decision to change how the legislative pension plan is administered, as outlined in Joanna Adams’ letter to retired state lawmakers dated March 4.” You included a list of search terms to use to search emails between the Pension Administrator Joanna Adams and certain recipients, including the Office of Management and Budget Director and the Governor Office’s Chief of Staff, Legislative Director, and Chief Legal Counsel. You clarify that you only seek emails showing decisions about this change, but not any emails regarding the deliberations.

The Pension Office denied access to these records because the records are not public pursuant to 29 *Del. C.* § 10002(o)(6). This section exempts any records that are excluded from public disclosure by statute, and the Pension Office asserts that 29 *Del. C.* § 8308(d) exempts the requested records from disclosure. Section 8308(d) states as follows:

All records maintained by the Board or the Office of Pensions and Investments relating to the pensions or pension eligibility of persons receiving pensions from the State or other post-employment benefits and who are not presently employed by or serving as officers of the State or its political subdivisions shall be confidential. Any record, material or data received, prepared, used or retained by the Board or its employees, investment professionals or agents relating to an investment shall not constitute a public record subject to Chapter 100 of this title.

In addition, the Pension Office also stated that the records you seek include records covered by the attorney-client privilege, which are also exempt under Section 10002(o)(6). This Petition followed.

In the Petition, you argue that the central question is whether Delaware law exempts all records created by the Pension Office, including records pertaining to the formation and execution of public policy. You allege that your request seeks the emails related to the final decision regarding a policy change about how the Pension Office interpreted a law governing the administration of the legislative pension, which is a matter of significant public interest. You argue that you are not requesting information about the investments or individual pensioners. You believe that the logical conclusion of the Pension Office's position means that the business of the entire Pension Office would be shielded from disclosure. Finally, you note that if the Pension Office provides an affidavit stating the emails to and from the Governor's Chief Legal Counsel are covered by attorney-client privilege, you would accept that response.

The Pension Office, through its legal counsel, replied to this Petition, asserting that its response was proper ("Response"). The Pension Office states that Section 8308(d) exempts these records from disclosure, as these records relating to "pension eligibility" are confidential.¹ The Pension Office provides that you are seeking "documents pertaining to the eligibility of those legislators who were elected between February 1, 1997 and January 1, 2012 and are eligible to receive a pension or collecting a pension," which in total amounts to "45 legislators/former legislators/survivors of deceased legislators."² The Pension Office contends that the Petition does not raise the question of whether all the Pension Office's records are exempt from FOIA. Rather, these records you seek are confidential by statute and the Petition's labelling of an eligibility determination regarding a group of pensioners as a "policy decision" does not avoid the application of this statutory language. Additionally, the Pension Office states that the emails sought include confidential communications between the Pension Office and its assigned Deputy Attorney General, which are subject to attorney-client privilege. The Pension Office enclosed the affidavit of the Pension Administrator, who attests that your request seeks "documentation of eligibility determinations for 45 state legislators elected between July 1, 1997 and December 31, 2011/former legislators meeting this criteria/survivors of deceased legislators meeting this criteria" and that "documents responsive to this request include email communication between [her] and [her]

¹ Response, p. 1.

² *Id.*, p. 2.

assigned Deputy Attorney General.”³ Additionally, to the best of her knowledge, the Administrator swears that the “records responsive to [your] request all pertain to the eligibility determination of the 45 affected pensioners, or are confidential attorney-client privileged communications.”⁴

DISCUSSION

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 However, 29 *Del. C.* § 10002(o)(6) excludes from the definition of “public record” any records that are specifically exempted from public disclosure by statute. Section 8308(d) states all records maintained by the Pension Office relating to the pension eligibility of persons receiving pensions from the State or other post-employment benefits and who are not presently employed by or serving as officers of the State are confidential. In this case, the characterization of the eligibility determinations of the pensioners as a “policy” decision does not preclude application of this statute. The Pension Office provided the affidavit of the Pension Administrator, attesting that this request seeks records that are confidential under this statute, namely the “documentation of eligibility determinations for 45 state legislators elected between July 1, 1997 and December 31, 2011/former legislators meeting this criteria/survivors of deceased legislators meeting this criteria.”⁷ As such, we find that these requested emails are confidential pursuant to Section 8308(d) and therefore exempt from disclosure under 29 *Del. C.* § 10002(o)(6).

We next find that the Pension Office adequately supported its second basis for the assertion of Section 10002(o)(6), the attorney-client privilege.⁸ In the Delaware Superior Court’s decision in *Flowers v. Office of the Governor*, in considering the assertion of the attorney-client privilege, the Court found that “an affidavit, along with a detailed written submission that indicates the reason

³ *Id.*

⁴ *Id.*

⁵ 29 *Del. C.* § 10005(c).

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

⁷ Response.

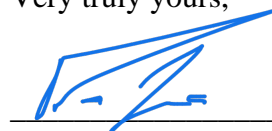
⁸ *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *3 (Feb. 20, 2018) (“We have expressly recognized in the past that the FOIA exemption for ‘records specifically exempted from public disclosure by statute or common law’ applies to the attorney work product doctrine and the attorney-client privilege.”); *Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342, at *8 (Jun. 6, 2016) (stating that attorney-client privilege “is a well-established basis for withholding records requested under FOIA.”)

for the denial may be sufficient to satisfy the public body's burden.”⁹ The Response states that the requested records included confidential communications between the Pension Office and its counsel subject to attorney-client privilege and produced an affidavit in support of this statement. Thus, we determine that the Pension Office sufficiently supported its denial of access to the attorney-client privileged records, and no violation of FOIA occurred in that regard.

CONCLUSION

Accordingly, we determine that Pension Office did not violate FOIA by denying access to the requested records.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: Patricia A. Davis, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁹ 167 A.3d 530, 549 (Del. Super. 2017) (accepting an affidavit that affirmed that the Governor's Office counsel reviewed the records and the withheld records were exempt under three privileges).