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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB36

September 17, 2024

VIA EMAIL

Aaron Wieczorek
m3nos95@yahoo.com

RE: FOIA Petition Regarding the Caesar Rodney School District

Dear Mr. Wieczorek:

We write in response to your correspondence, alleging that the Caesar Rodney School District 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 District did not violate FOIA by denying access to the records you requested.

BACKGROUND

On July 18, 2024 and July 22, 2024, you filed two FOIA requests with the District. The first request sought documentation of training provided to any related District staff who interact with your child during school activities on your child's specific needs.¹ You also sought the name, title, and qualification of the trainer(s), copies of the training materials, a list of staff members who received the training, and training dates; additionally, you asked for internal correspondence between various District staff members regarding your child; communications regarding you or your spouse for the 2023-24 school year; communications regarding a specified employee and that individual's certification; and communications regarding your child's evaluation.

¹ Petition.

Your second request on July 22, 2024 sought one specific employee's initial employment application, including her job application, resume, transcripts, references, background check, and employment contract. In addition, you requested the employee's certification status, including any certifications held during employment with the District, and communications between the District and the Delaware Department of Education regarding this employee's certification status.

The District denied access to the records sought in both requests. Regarding the first request, the District stated that all requested training documentation regarding your child have been or will be provided to you, with the exception of the training materials, which the District stated it does not possess. The District stated that the requested communications were exempt from FOIA, as records pertaining to potential or pending litigation. The District asserted that your family previously filed a complaint with the U.S. Department of Education's Office of Civil Rights, which has been resolved, but you have filed another complaint with the Office of Civil Rights; you also emailed the District on July 17, 2024, advising that you are updating your complaint about the matter involving your child's teacher's certification and submitting additional complaints to the Office of the Governor, the Attorney General, and the State Board of Education. The District asserted that the pending litigation exemption applies, as "litigation" includes quasi-judicial proceedings, including proceedings of administrative bodies that determine legal rights outside the traditional court of law. The District stated that the potential litigation exemption also applies, as the parties have been previously engaged in litigation regarding the subject matter of this request and you informed the District of your intent to pursue legal or administrative action on July 17, 2024, which was a day prior to filing the first request. The District stated you are clearly attempting to advance your interests in pending or potential litigation.

Regarding the second FOIA request, the District reiterated that the pending or potential litigation exemption applied to these records, as your complaint is about this particular employee's certification. Additionally, the District asserted that the personnel file exemption protects the records you requested, as they pertain to judgments about the employee's competency, qualifications, and abilities. The District argued that these requested records and communications are contained in or associated with this employee's personnel file and are therefore exempt.

This Petition followed, alleging that the District inappropriately denied this request. You argue that these requests seek records pertaining to the District's "due diligence in ensuring proper teacher certification."² You argue that these records are critical to understanding the District's practices and ensuring that children are receiving instruction from qualified educators. You contend that refusing these materials obstructs your ability to make informed decisions about your child's education. You assert that the pending litigation exemption does not apply because the focus of your request is an issue of public interest; the District must establish a nexus between the records and litigation; and the Office of Civil Rights complaints are administrative, not adversarial, and their conclusions are not binding. You argue that the District's practices are inconsistent with the Delaware Department of Education, which suggests the District took an arbitrary and capricious approach, and you allege that the Director of Human Resources' denial of the FOIA request constitutes a conflict of interest.

² *Id.*

The District, through its legal counsel, replied to the Petition and enclosed the affidavit of the Assistant Superintendent (“Response”). The District argues that its assertion of the pending or potential litigation and personnel file exemptions was appropriate in this case. The Assistant Superintendent attests that you filed a complaint with the Office of Civil Rights in 2022, and on June 18, 2024, you filed a second complaint. The Assistant Superintendent states under oath that this 2024 complaint alleges disability discrimination, denial of a free and appropriate public education, lack of certification of your child’s teacher, and retaliation. The District provided a copy of this complaint and your July 17, 2024 email, sent the day prior to the first FOIA request, stating your plans to update the Office of Civil Rights complaint with the matter of altering a certification date and to submit additional complaints to the Office of the Governor, the Delaware Attorney General, and the State Board of Education. The Assistant Superintendent asserts that the subject matter of the requested documents is directly related to the subject matter of the pending and potential litigation noted in the affidavit. The District argues that “quasi-judicial” proceedings are considered litigation under this exemption, and the parties here are currently engaged in litigation pertaining to these requests. Your child’s teacher is the subject of the requests and the records sought are related to the complaint about the teacher’s certification. In addition, the District asserts that the requested communications and records in the second request are exempt under the personnel file exemption, as they are contained in or associated with the teacher’s personnel file.

DISCUSSION

The public body has the burden of proof to demonstrate its compliance with the FOIA statute.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ As a preliminary matter, this Office is not authorized to address non-FOIA claims, including the allegations of conflict of interest and arbitrary and capricious actions.⁵

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.⁶ Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”⁷ “[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in

³ 29 Del. C. § 10005(c).

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

⁵ 29 Del. C. § 10005(e).

⁶ 29 Del. C. § 10003(a).

⁷ 29 Del. C. § 10002(o)(9).

the litigation.”⁸ “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”⁹ “And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts’ rules of discovery.”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

In this case, the District satisfied this first prong. This Office considers quasi-judicial proceedings “litigation” for the purposes of applying 29 *Del. C.* § 10002(o)(9).¹² This term includes the “proceedings of administrative bodies that in essence determine legal rights outside the traditional court of law.”¹³ To support this prong, the District provided a copy of this disability discrimination complaint with the Office of Civil Rights.¹⁴

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.¹⁵ In this case, you sought records related to your child and the training of District staff that interacts with your child. In addition, you have sought records regarding the hiring and employment of a particular teacher that worked with your child, including the teacher’s certification status. The pending complaint pertains to your child’s records and this same teacher’s certification. As these two requests, which were filed about a month after the initial complaint and within a few days after you indicated the complaint would be updated, pertain to the subject of

⁸ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

⁹ *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

¹⁰ *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

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).

¹² *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-5 (May 6, 2003).

¹³ *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at *1-2 (Nov. 13, 2003) (citation omitted).

¹⁴ Response, Ex. B.

¹⁵ *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *5 (“We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.”).

your complaint with the Office of Civil Rights, we find that the second prong is satisfied.¹⁶ As such, the District has met its burden to demonstrate that the records were properly withheld under the pending litigation exemption.

CONCLUSION

For the reasons set forth above, we conclude that the District did not violate FOIA in denying 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: Michelle G. Bounds, Attorney for the Caesar Rodney School District

¹⁶ *Del. Op. Att’y Gen.* 23-IB17, 2023 WL 4165965, at *2 (Jun. 13, 2023).