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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB42

October 9, 2024

VIA EMAIL

Brianna Hill
bhill@spotlightdelaware.org

RE: FOIA Petition Regarding City of Wilmington

Dear Ms. Hill:

We write in response to your correspondence, alleging that the City of Wilmington (the “City”) 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 violate FOIA by denying access to the records you requested.

BACKGROUND

On August 26, 2024, you submitted a FOIA request to the City of Wilmington for copies of correspondence between the Mayor’s office, the City, Wilmington Police Department, and the Urban Arts Exchange as it related to the Positive Vibes in the Park: Justice For All event that was moved from the UAE to the Route 9 library on Friday, August 23, 2024.

The City’s counsel provided a response on the City’s behalf on September 5, 2024, stating that the records requested are exempt from disclosure pursuant to 29 *Del. C.* § 10002(o)(9). The City asserted that “[b]ased on the facts surrounding the Justice For All event, the City has determined that there is a realistic and tangible threat of litigation associated with this matter.”¹

¹ Response, Exhibit B.

The City explained that “[o]n August 29, 2024, Spotlight Delaware published an article ...indicat[ing] that the event organizer intends to bring litigation against the City of Wilmington and was in the process of retaining an attorney for that purpose.”² The City concluded that because it was “clear that the event organizer intends to bring suit against the City of Wilmington, and has taken active steps to [do] so, the requested records are exempt from disclosure.”³

This Petition followed, alleging that the City violated FOIA by denying access to the requested records. You assert that the City’s determination to assert the potential litigation exemption was in error because you are a reporter and not a potential litigant.

The City, through its legal counsel, replied to the Petition and enclosed your FOIA request, the City’s response asserting the potential litigation exemption, and the Spotlight Delaware article (“Response”). The City asserts that your FOIA request was properly denied because litigation is likely and reasonably foreseeable and there is a “clear nexus” between the requested documents and the subject matter of the litigation. The City argues that the identity of the requesting party is immaterial when determining whether the potential litigation exemption applies because “[f]orcing the City to produce documents and records outside of discovery, regardless of who requests the records, has the potential to adversely affect the City’s litigation position.”⁴

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for copying of public records.⁵ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷

The Petition alleges that the City improperly relied on 29 *Del. C.* § 10002(o)(9) to deny access to the requested records, which exempts “records pertaining to pending or potential litigation which are not records of any court.”⁸ The Petition argues that because the requesting party is a reporter and not a potential litigant, that the potential litigation exemption does not

² *Id.*

³ *Id.*

⁴ Response, p. 5.

⁵ 29 *Del. C.* § 10003(a).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁸ Petition.

apply.⁹ The City argues that the identity of a requesting party does not matter as the statute does not distinguish between potential litigants and parties outside any potential litigation. FOIA generally should be interpreted to provide citizens with access to public records. However, the plain language of the statute includes an exemption for potential litigation and does not distinguish between potential litigants and uninvolved parties.¹⁰ Accordingly, we find that the identity of the requesting party is not determinative of whether the potential litigation exemption applies.

The Superior Court of Delaware has adopted this Office’s two-prong test for potential litigation exemption: “(1) litigation must be likely to reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”¹¹ To satisfy the first prong, some objective indicators of potential litigation may include a written demand letter in which action is demanded, 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 express of an intent to sue.¹² Here, the City has not received a demand letter from an attorney portending to represent the event organizer. The City cites to a news article where the event organizer alleges that he contacted private attorneys to review the situation to determine whether his group might file a lawsuit against the City.¹³ The article also states that the event organizer was told by the head of Delaware’s Office of Defense Services to try to show the City’s legal department that they have some legal exposure by demanding that the City believed the event was a ‘rally’.¹⁴ But there is nothing to indicate that the event organizer followed up on that advice by

⁹ The Petition cites to *Del. Op. Att’y Gen.* 17-IB24, 2017 WL 3426264 (July 14, 2017) for support that the pending or potential litigation exemption applies only to litigants or potential litigants. That Opinion in *dicta* states “that the [pending or potential litigation] exemption applies where litigators or litigants are seeking information that might help them in court.” The parties in that Opinion were in fact litigants in a pending lawsuit and that Opinion included an acknowledgement that the determination was “based on unique facts relevant to [that] matter” and “does not constitute precedent and should not be cited as such by future parties.”

¹⁰ *Del. Op. Att’y Gen.* 21-IB32, 2021 WL 5982340, at *4 (Dec. 1, 2021) (“As there is no statutory basis to make exceptions to FOIA’s exemptions in Section 10002(o) based solely on the significance of the public interest nor a basis in the potential litigation exemption to exclude records transmitted to outside parties, the first two issues are without merit.”). The Superior Court has found that the two-prong test for pending or potential litigation “strikes a balance between the need to construe the exceptions to FOIA narrowly and the need to give effect to the actual words of the statute which provide the exception.” *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).

¹¹ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (citation omitted).

¹² *Id.*

¹³ Response, Exhibit C, p. 3.

¹⁴ *Id.*

engaging an attorney who could file a private civil cause of action against the City. All we are left with are statements in the press. “In our litigious society, a governmental agency always faces some threat of suit. To construe the term ‘potential litigation’ to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].”¹⁵ Moreover, there is no history between these two entities that suggests litigation is potential, nor has the City pointed to any similar litigation already underway. On this record, we cannot find that litigation is “potential” and, accordingly, we find the potential litigation exception does not apply.

CONCLUSION

For the reasons set forth above, we conclude that the City violated FOIA by denying access to the requested records. 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.

Very truly yours,

/s/ Victoria E. Groff

Victoria E. Groff
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

¹⁵ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).