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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB19

March 24, 2025

VIA EMAIL

David Vezmar
dave.vezmar@bostonbeer.com

RE: FOIA Petition Regarding the City of Milford

Dear Mr. Vezmar:

We write in response to your correspondence, alleging that the City of Milford 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 of 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 as alleged.

BACKGROUND

On January 21, 2025, you submitted a FOIA request to the City seeking (1) all "emails, sent or received, beginning June 1, 2024 through January 21, 2025 by all Milford City Council Members, Milford City Manager, or Milford Mayor containing any of the following words: 'Cannabis,' 'Marijuana,' 'weed,' [or] 'pot' [f]rom or to their City of Milford email account" and (2) all "emails from State Representative Bryan Shupe received by any City of Milford Council member, City of Milford City Manager, or City of Milford Mayor beginning June 1, 2024 through January 21, 2025."¹ You followed up on February 6, 2025 requesting the records be provided. The following day, the City's counsel responded, stating that the time for a response has not yet expired, as the City is permitted fifteen business days for a response. The City's counsel also noted that an additional ten days would be required to complete the response and that any emails to or

¹ Petition.

from State Representative Shupe are not public records pursuant to 29 *Del. C.* §10002(o)(19) and if there any such emails, they would be excluded from the production. This Petition followed.

At the time the Petition was filed, you had not yet received a response from the City, and you state you were following up on the “delayed” processing. You also requested a review of the City’s statement that the emails with State Representative Shupe would be exempt under Section 10002(o)(19), as you believe this section only applies to communications with constituents, and you are seeking State Representative Shupe’s correspondence with public officials, including the City Council, City Manager, and Mayor – all of whom you assert are subject to FOIA laws.

The City, through its legal counsel, replied to the Petition and enclosed the affidavit of its City Clerk, who fulfills the FOIA coordinator role for the City (“Response”). The City provided a response to the request on February 28, 2025, and a copy of the transmittal email was included with the Response.² The City argues that its withholding of the emails with the state representative was appropriate under Section 10002(o)(16) and cites *Flowers v. Office of the Governor*, in which the Court found the legislative email exception applies broadly.³ As such, the City maintains that its exclusion of the emails with a member of the General Assembly was appropriate.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁴ The public body carries the burden of proof to justify its denial of access to its records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ The Petition’s first claim regarding the City’s delayed response is now moot, as the City’s final response, including a production of records, was sent on February 28, 2025.⁷

The Petition also challenges the City’s denial of access to emails to and from State Representative Shupe. Under Section 10002(o)(16), FOIA exempts “emails received or sent by

² Response, Ex. 3.

³ 167 A.3d 530 (Del. Super. 2017).

⁴ 29 *Del. C.* § 10003(a).

⁵ 29 *Del. C.* § 10005(c).

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

⁷ Response, Ex. 3; *see, e.g., Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at *2 (Jun. 7, 2018); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998)).

members of the Delaware General Assembly or their staff.”⁸ In *Flowers*, the Superior Court of Delaware determined that emails sent or received by members of the General Assembly are not public records, and there is no “content or context” limitation on the application of this exemption.⁹ The fact that these emails are exchanged with other public officials does not alter the broad application of this exemption. The City provided the affidavit of the City Clerk, who attests that all emails to or from State Representative Shupe were excluded from the production.¹⁰ Accordingly, we find no violation of FOIA in this regard, as the emails to and from a member of the General Assembly are exempt from disclosure under Section 10002(o)(16).

CONCLUSION

For the reasons set forth above, we conclude that the City did not violate FOIA by denying access to the emails requested. In addition, the claim regarding the timing of the City’s response is moot.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: David N. Rutt, City Solicitor

⁸ 29 *Del. C.* § 10002(o)(16).

⁹ 167 A.3d at 544.

¹⁰ Response, Ex. 4.