



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB25

April 15, 2025

VIA EMAIL

Shyanne Miller
shyanne.miller@mail.sit.edu

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Miller:

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 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 by denying access to the requested records.

BACKGROUND

On December 17, 2024, you submitted a FOIA request seeking "any emails, letters, text messages, or correspondences between the Mayor's office, the Wilmington Police Department, [and/or] Downtown Visions" regarding "Reverend Patrick Burke," "St. Andrews and Matthews Episcopal Church at 719 N Shipley Street Wilmington, DE 19801," and "Friendship House at 720 Orange St Wilmington, DE 19801" in addition to "homelessness, homeless people" and the "removal of the bench outside Friendship House on Orange Street."¹ The City produced some responsive records and denied access to the remainder of the requested records under 29 *Del. C.* § 10002(o)(6), asserting that attorney-client communications are not subject to disclosure. You filed

¹ Petition.

a petition following this denial, and this Office issued a determination on February 6, 2025.² This determination found that the City violated FOIA, because this Office was unable to determine whether the City appropriately asserted these exemptions regarding the full scope of the withheld documents with a clear understanding when it applied them. It was recommended that the City review its records and supplement its response to your request, in accordance with that opinion and the FOIA statute, including the timeframes set forth in Section 10003.

After Attorney General Opinion No. 25-IB08 was issued, the City sent you a supplement to its response, as recommended. The City provided responsive records, stating “all responsive, non-exempt records responsive to this request” were attached.³ Additionally, the City stated that “correspondence between the Mayor’s office and the Wilmington Police Department which included the City Solicitor is subject to attorney-client privilege therefore these records have been withheld pursuant to 29 *Del. C.* §10002(o)(6)” and “these communications were made confidentially for the purpose of facilitating the rendition of professional legal services to the Office of the Mayor and the Wilmington Police Department.”⁴ Further, the City asserted that “investigative narratives prepared by the Wilmington Police Department in response to calls for service at the addresses specified in your request are investigatory files compiled for civil or criminal law enforcement purposes,” and “therefore pursuant to 29 *Del. C.* §10002(o)(3) these records have been withheld.”⁵ The City also replied that the investigative reports were also shared confidentially with the City’s counsel for purposes of seeking legal advice. This Petition followed, in which you argue that you still have not been provided with the materials you requested, and you challenge the City’s assertion that your request violates FOIA.

The City, through its Assistant City Solicitor, replied to the Petition and enclosed the City Solicitor’s affidavit (“Response”). The City acknowledges that it supplemented its response and sent the same responsive records, clarifying that the attorney-client privilege and investigative file exemption applies. The City Solicitor attests that he reviewed all the records, including those withheld, and the records withheld for attorney-client privilege fall under one of the following categories: (1) correspondence from employees within the Mayor and Wilmington Police Department sent to the City Solicitor and the Deputy City Solicitor, expressly to seek legal advice within the lawyer-client relationship; (2) correspondence from the City Solicitor or Deputy City Solicitor providing legal advice to staff members in the Mayor’s Office or and the Police Department within the lawyer-client relationship; and (3) correspondence from the City Solicitor and/or Deputy City Solicitor for the express purpose of formulating and providing legal advice within the lawyer-client confidential relationship. In addition, the City Solicitor states under oath that all investigative summaries and narratives compiled by members of the City Police Department internally are exempt under Section 10002(o)(3), in addition to the attorney-client

² *Del. Op. Att’y Gen.* 25-IB08, 2025 WL 627016 (Feb. 6, 2025).

³ Petition.

⁴ *Id.*

⁵ *Id.*

privilege because those reports were provided to the City Solicitor and Deputy City Solicitor to obtain legal advice within the lawyer-client relationship.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁶ The public body has the burden of proof to justify its denial of access to records.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸ When denying a FOIA request, a public body must provide the reasons for denying access to the requested records but is not required to produce an index, or other compilation, as to each record or part of the record denied.⁹

The City asserts that some records were appropriately withheld, because they were attorney-client privileged materials under Section 10002(o)(6) and investigatory files under Section 10002(o)(3). In *Flowers v. Office of the Governor*, in considering the Governor Office’s assertion of the attorney-client privilege and other privileges, the Court found that “an affidavit, along with a detailed written submission that indicates the reason for the denial *may* be sufficient to satisfy the public body’s burden.”¹⁰ In that case, the legal counsel attested that she reviewed the records and identified the exemptions applied. The Governor’s Office, in its response to that petition, also explained the application of the attorney-client privilege, specifically noting that it “only withheld as attorney-client privileged those communications in which legal advice was sought or provided by legal counsel to the Office.”¹¹ Based on this and the explanations for the other privileges, the Court found that the “Response and [the attorney’s] Affidavit show that the Governor’s Office carefully applied well-recognized privileges with a clear understanding of those privileges when it applied them.”¹²

Section 10002(o)(6) exempts records that are excluded from public disclosure requirements by common law, which includes the attorney-client privilege.¹³ “The current scope

⁶ 29 Del. C. § 10003(a).

⁷ 29 Del. C. § 10005(c).

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁹ 29 Del. C. § 10003(h).

¹⁰ 167 A.3d 530, 549 (Del. Super. 2017) (emphasis in original).

¹¹ *Id.*

¹² *Id.*

¹³ *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

of the privilege in Delaware is defined in D.R.E. 502(b) which may be paraphrased as it applies to the present case as follows: ‘the privilege extends to a (1) communication, (2) which is confidential, (3) which was for the purpose of facilitating the rendition of professional legal services to the client, (4) between the client and his attorney.’”¹⁴ In this affidavit, the City Solicitor attests that he reviewed the withheld records and asserts that, similar to the explanation offered in *Flowers*, the withheld communications seek or provide legal advice within the lawyer-client confidential relationship. Thus, we find that the City’s statements under oath are sufficient to meet the City’s burden with respect to the attorney-client privileged communications.

This request also seeks communications between the Mayor’s office and the City Police Department. Section 10002(o)(3) exempts from disclosure “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.” The City Solicitor states under oath that “all of the investigative summaries and narratives compiled by the police department internally in response to [your] requests for information are exempt from disclosure because they are investigatory files compiled for civil or criminal law enforcement purposes under § 10002(o)(3).”¹⁵ As police investigatory records are exempt under Section 10002(o)(3), we find no violation in this regard.

CONCLUSION

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

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

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.”).

¹⁴ *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) (citation omitted).

¹⁵ Response, Ex. F.

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor