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## OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

### Attorney General Opinion No. 25-IB30

May 27, 2025

#### **VIA EMAIL**

Brianna Hill  
Spotlight Delaware  
[bhill@spotlightdelaware.org](mailto:bhill@spotlightdelaware.org)

#### **RE: FOIA Petition Regarding the City of Wilmington**

Dear Ms. Hill:

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 violated FOIA by failing to carry its burden of proof for invoking the commercial and financial information exemption in these circumstances. However, we find that the City did not violate FOIA by failing to include an affidavit with its response to your request.

#### **BACKGROUND**

On March 26, 2025, you submitted a FOIA request seeking "PowerPoint presentations or other visual materials or documents that were presented or distributed during a meeting that took place on 3/18/2025 and was attended by officials from the city and the Riverfront Development Corporation."<sup>1</sup> The City denied access to the requested records under 29 *Del. C.* § 10002(o)(2), which exempts commercial or financial information obtained from a person which is of a privileged or confidential nature. This Petition followed.

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<sup>1</sup> Petition.

In the Petition, you assert that this presentation did not take place in a confidential setting, as the presentation occurred in a coworking location which houses many small businesses, including potential competitors, and the meeting occurred in a conference room that faced a large open-access workspace, allowing you, and potentially others, to observe the presentation. The portion of the presentation you viewed included a certain map, and you allege that this map is not confidential, and FOIA requires the City to produce the nonexempt materials, including the map, and redact only the exempt information. You also allege that a detailed affidavit was not provided with the response to substantiate the legal privilege that is claimed. Finally, you argue that the meeting included City and Riverfront Development Corporation officials, both public bodies with little claim to confidentiality on their own; as such, land deals that involve these two public bodies are public information.

The City, through its Assistant City Solicitor, replied to the Petition and enclosed the affidavit of the City's Deputy Chief of Staff for Policy and Communications ("Response"). The City asserts that the Mayor and members of his staff attended a meeting at a nonpublic coworking office space hosted by a private property development organization. The City alleges that the presentation is not subject to disclosure under FOIA. The City states that the meeting involved a potential real estate development within the City and the author of this presentation has a commercial interest in the subject matter. This presentation was voluntarily provided to the City and is the only responsive record to this request. The City also gives the link for accessing the referenced map online. When it received your FOIA request, the City states it reached out to the author, who stated they consider the presentation confidential because it involves preliminary real estate discussions in anticipation of contract negotiations and asked that it not be shared publicly. The City claims that Section 10002(o)(2) is applicable because the information is commercial, which is broadly defined to include when the provider of that information has a commercial interest in the information submitted, and the provider here has a commercial interest in a real estate development subject to negotiation. The City contends that the confidentiality of the record is to be determined by the provider of the information, and "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential.'"<sup>2</sup> Even though you surreptitiously observed a limited portion of the presentation, the City argues that limited public disclosure does not waive the confidentiality of the presentation.

## **DISCUSSION**

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.<sup>3</sup> The public body has the burden of proof to justify its denial of access to records.<sup>4</sup> In *Judicial Watch v. University of Delaware*, the Supreme Court of Delaware

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<sup>2</sup> Response, p. 5.

<sup>3</sup> 29 Del. C. § 10003(a).

<sup>4</sup> 29 Del. C. § 10005(c).

determined that when the staff of a public body wish to establish facts based on personal knowledge to satisfy this burden of proof, those facts must be submitted under oath.<sup>5</sup>

The Petition alleges that the City failed to include a detailed affidavit with its response to the request. 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.<sup>6</sup> If a public body's denial of records is challenged through a petition or lawsuit, the public body then may be required to produce an affidavit to meet its burden in those proceedings, but a public body is not required to produce an affidavit to accompany its response to a records request under FOIA.<sup>7</sup> We find no violation occurred with respect to the City's failure to provide an affidavit with its response.

The Petition also claims that the requested records were improperly denied under Section 10002(o)(2). This exemption applies to “[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.”<sup>8</sup> Section 10002(o)(2) in Delaware's FOIA law is nearly identical to an exemption for trade secrets and commercial or financial information in federal FOIA law.<sup>9</sup> In order for a public body to withhold non-trade secret information under this exemption, federal precedent has determined that the agency “must demonstrate that the withheld information is ‘(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.’”<sup>10</sup> Regarding the “confidentiality” requirement, the U.S. Supreme Court provided “[a]t least where commercial or financial information is both

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<sup>5</sup> 267 A.3d 996, 1011 (Del. 2021) (“A statement made under oath, like a sworn affidavit, will ensure that the court's determination regarding the public body's satisfaction of the burden of proof is based on competent evidence.”).

<sup>6</sup> 29 Del. C. § 10003(h)(2).

<sup>7</sup> Del. Op. Att'y Gen. 25-IB06, 2025 WL 503941, at \*2 (Jan. 21, 2025) (finding that a public body does not have an obligation to provide an affidavit with its response to a FOIA request).

<sup>8</sup> 29 Del. C. § 10002(o)(2).

<sup>9</sup> See Del. Op. Att'y Gen. 14-IB04, 2014 WL 3936593, at \*3-6 (July 18, 2014) (applying federal precedent in the context of a Section 10002(o)(2) analysis); Del. Op. Att'y Gen. 00-IB15, 2000 WL 1920102, at \*2 (Oct. 4, 2000) (noting that this Office previously “relied on cases under the federal FOIA trade secrets exception, which ‘uses language nearly identical to Delaware's Sunshine Law.’”) (citation omitted).

<sup>10</sup> See, e.g., *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 58 F.4th 1255, 1262 (D.C. Cir. 2023); *Gov't Accountability Project v. U.S. Dep't of Treasury*, 2025 WL 721734, at \*2 (D.D.C. Mar. 6, 2025).

customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4.”<sup>11</sup>

The affidavit of the Deputy Chief of Staff for Policy and Communications provides that City officials attended this meeting, a copy of the presentation shown at the meeting was provided to the City, and this presentation is the only responsive record to the request. In addition, the Deputy Chief states under oath that he reached out to the author of the presentation, who stated that the subject matter of the presentation pertains to “preliminary real estate discussions in anticipation of contract negotiations” and the presentation is confidential in its entirety, and requested that it not be shared publicly.<sup>12</sup> As the affidavit lacks sufficient detail to satisfy the three parts of this test for commercial or financial information, we find that the City violated FOIA by failing to support its assertion of Section 10002(o)(2).<sup>13</sup> We recommend that the City, in compliance with the timeframes set forth in Section 10003, review its position and supplement its response to your request, to include specific, non-conclusory statements to support its invocation of Section 10002(o)(2), and if applicable, provide any additional public materials to you.

### **CONCLUSION**

For the reasons set forth above, we conclude that the City violated FOIA by failing to carry its burden of proof for invoking the commercial and financial information exemption in these circumstances. However, we find that the City did not violate FOIA by failing to include an affidavit with its response to your request.

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<sup>11</sup> *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 440 (2019).

<sup>12</sup> Response, Aff. of Deputy Chief of Staff for Policy and Communications dated Apr. 29, 2025.

<sup>13</sup> *Humane Soc’y Int’l v. U.S. Fish and Wildlife Serv.*, 2021 WL 1197726, at \*4 (D.D.C. Mar. 29, 2021) (“Of the fourteen that are not inadmissible hearsay, twelve are conclusory; in other words, they do not attest to specific facts indicating how each objector treats the relevant data. . . . To take one example, the declaration from Bushmaster Reptiles merely parrots the language requested by the Service by stating that the company ‘considers its LEMIS data ... to be private,’ ‘treats the [information] as both customarily and actually private,’ ‘has not disclosed such information ... to the public,’ and ‘believes that the information ... is not routinely available to the public from other sources.’ Willis Decl. Ex. at 47–49. Such a certification does not provide the Court with facts against which to apply the *Food Marketing* test.”).

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: John D. Hawley, Assistant City Solicitor