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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB36

July 22, 2025

VIA EMAIL

Xerxes Wilson
The News Journal
xwilson@delawareonline.com

RE: FOIA Petition Regarding the Office of the Governor

Dear Mr. Wilson:

We write in response to your correspondence alleging that the Office of the Governor violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat your 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. For the reasons set forth below, we determine that the Governor's Office did not violate FOIA by withholding materials from its production based on the attorney-client privilege, executive privilege, and legislative email exemption in Section 10002(o)(16).

BACKGROUND

On March 25, 2025, you submitted a FOIA request for "[a]ll email communication and email attachments involving the Governor's Office staff and/or Governor Matt Meyer containing the words: 'Laster,' or 'Cambridge Analytica' or 'Meta' or 'McCormick' from Jan. 21, 2025 to March 25, 2025."¹ After extending the time for a response, the Governor's Office provided a batch of responsive, redacted records and denied access to the remaining records, noting that materials were withheld or redacted pursuant to two FOIA provisions: 29 *Del. C.* § 10002(o)(6) for the

¹ Petition.

executive privilege and attorney-client privilege and 29 *Del. C.* § 10002(o)(16) for legislative emails. The response also noted that one redaction was made to personal contact information unrelated to and not used for State business.² This Petition followed.

In the Petition, you assert that many redactions pertain to correspondence regarding media requests, and you believe that the responsive materials withheld “do not fall into a narrow view of those exemptions.”³ You contend that the attorney-client privilege should only apply to correspondence of attorneys retained or employed by the executive branch and “matters of pending or probable litigation or specific legal matters like discussion or negotiation of a contract or collective bargaining.”⁴ Executive privilege, you argue, is not part of the Delaware Code, nor are you aware of the legal basis for such a privilege. Finally, you ask this Office to weigh the purpose and importance of the public interest in this request against the specific harm that may arise from disclosure, and you request a determination that disclosure of these records is appropriate here, as the importance of publicly disclosing these records related to Delaware’s corporate franchise outweighs any speculative harm.

On July 2, 2025, the Governor’s Office, through its legal counsel, replied to the Petition (“Response”). The Response included the affidavit of the Chief Legal Counsel. The Governor’s Office argues that there is no legal basis for categorically excluding media requests from attorney-client privilege or executive privilege. The Governor’s Office points out that the executive privilege has been expressly recognized in common law, protecting “advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.”⁵ Further, the Governor’s Office argues that your characterization of the scope of the attorney-client privilege is too narrow, as the communications need not involve pending or potential litigation or collective bargaining; rather, the privilege applies to communications to or from a lawyer and the client made for the purposes of facilitating the rendition of legal advice. Additionally, the Governor’s Office asserts that your request to engage in a balancing test, in reliance on earlier precedent, is not appropriate, as the *Flowers v. Office of the Governor*⁶ case sets the current, applicable standard. The *Flowers* standard requires a public body to show it “applied well-recognized privileges with a clear understanding of those privileges when it applied them.”⁷

² This redaction of personal contact information is not challenged in the Petition.

³ Petition.

⁴ *Id.*

⁵ Response, p. 3 (citation omitted).

⁶ 167 A.3d 530, 549 (Del. Super. 2017).

⁷ Response, p. 5.

DISCUSSION

Delaware's FOIA law "was enacted to ensure governmental accountability by providing Delaware's citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities."⁸ FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁹ In this petition process, the burden of proof is on the public body to justify the denial of access to records.¹⁰ In certain circumstances, a sworn affidavit may be required to meet that burden.¹¹

We first consider the Petition's claims regarding the attorney-client and executive privileges. In reviewing the Governor Office's invocation of these privileges and withholding of draft documents in *Flowers v. Office of the Governor*, the Court determined 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."¹² In its response to the petition in *Flowers*, the Governor's Office explained its use of the attorney-client privilege, stating that it "only withheld as attorney-client privileged those communications in which legal advice was sought or provided by legal counsel to the Office," and its use of the executive privilege, stating the Governor's Office withheld "email communications between the Governor and members of the Governor's Cabinet or senior policy staff," in reliance on the *Guy v. Judicial Nominating Commission*.¹³ Included with this response in *Flowers* was an affidavit from the legal counsel attesting she personally reviewed the records and withheld materials under the stated privileges. The Court in *Flowers* concluded 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."¹⁴ Following the *Flowers* case, the Supreme Court of Delaware in *Judicial Watch, Inc. v. University of Delaware* determined that a public body, when justifying the denial of access to records, must submit statements of fact that are requisite to meeting the burden of proof under oath.¹⁵

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁹ 29 Del. C. § 10003(a).

¹⁰ 29 Del. C. § 10005(c).

¹¹ *Judicial Watch, Inc.* 267 A.3d at 1008-1012.

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

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Judicial Watch, Inc.*, 267 A.3d at 1010 ("Requiring facts submitted under oath, such as through an affidavit, to justify the denial of records is consistent with the statute's scheme. . . . 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").

We determine that the Governor's Office in this case met the *Flowers* standard, demonstrating that it carefully applied the attorney-client and executive privileges with a clear understanding of those privileges when it applied them. In the Governor's Office's submission, the Chief Legal Counsel attests that he personally reviewed every record that was redacted or withheld and avers "there is a good faith basis to withhold or redact these records" pursuant to attorney-client privilege, executive privilege, and the legislative exception under Section 10002(o)(16).

Section 10002(o)(6) exempts records that are excluded from public disclosure requirements by common law, including the attorney-client privilege.¹⁶ The scope of the privilege is defined in Delaware Rules of Evidence 502(b) and includes " (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."¹⁷ The Chief Legal Counsel attests he understands the privilege as described in the accompanying Response, which cites Rule 502, and he attests the attorney-client privileged records withheld were "communications to [and] from a lawyer and his or her client, made for the purpose of facilitating the rendition of professional legal advice" and that no exception to the privilege applied to the withheld communications. We find that the Governor's Office's submission satisfies its burden with respect to the attorney-client privilege.

Section 10002(o)(6) also covers the executive privilege, which is a recognized privilege in Delaware, grounded in common law and the State Constitution.¹⁸ In *Flowers*, the Governor's Office appropriately withheld "email communications between the Governor and members of the Governor's Cabinet or senior policy staff," citing its reliance on the *Guy v. Judicial Nominating Commission* case.¹⁹ Similarly, in this case, the Chief Legal Counsel attests that the records withheld under executive privilege "concerned sensitive confidential communications by and between the Governor or his senior staff and concerned the Governor's executive functions, including developing policy, official public messaging, and determining approaches to pending litigation."²⁰ The Chief Legal Counsel also references, under oath, his review of the *Guy v.*

¹⁶ *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 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.").

¹⁷ *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) (citation omitted).

¹⁸ *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 782 (Del. Super. 1995) ("This Court, therefore, recognizes as part of the constitutional and common law of the State the doctrine of executive privilege with respect to the source and substance of communications to and from the Governor in the exercise of his appointive power.").

¹⁹ *Flowers*, 167 A.3d at 549.

²⁰ Aff. of Chief Legal Counsel dated July 2, 2025.

*Judicial Nominating Commission*²¹ case and other precedent. We determine the Governor's Office's evidentiary submission is sufficient to support its assertion of the executive privilege.

Finally, Section 10002(o)(16) exempts "emails received or sent by members of the Delaware General Assembly or their staff." In *Flowers*, the Court determined that this exemption is applied in accordance with its plain meaning; examining the content or context of any email is not part of the analysis.²² The Chief Legal Counsel states under oath that the withheld emails were "to or from a General Assembly member or a General Assembly staff member."²³ Based on this sworn evidence, we find adequate support for the Governor's Office's application of this exemption.

CONCLUSION

For the foregoing reasons, we conclude that the Governor's Office did not violate FOIA by withholding materials from its production based on the attorney-client privilege, executive privilege, and the legislative email exemption in Section 10002(o)(16).

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: Wilson B. Davis, Chief Legal Counsel, Office of the Governor
Dorey L. Cole, Deputy Attorney General

²¹ 659 A.2d 777 (Del. Super. 1995).

²² *Flowers*, 167 A.3d at 544-45.

²³ Aff. of Chief Legal Counsel dated July 2, 2025.