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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB50

October 9, 2025

VIA EMAIL

Keriann Conroy
keriann@energyandpolicy.org

RE: FOIA Petition Regarding Sussex County

Dear Ms. Conroy:

We write in response to your correspondence alleging that Sussex County 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 County did not violate FOIA by denying access to the requested records.

BACKGROUND

On July 7, 2025, you submitted a FOIA request, seeking records regarding the topic of "offshore wind," including communications between certain County Councilmembers and the email domain "@caesarrodney.org" and several other email addresses for specified timeframes. The County denied your request, because you lacked citizenship in Delaware and the records you seek are exempt, as the subject of this request is related to pending litigation. You responded that your request was submitted on behalf of a Delaware corporation, which is considered a "citizen" and requested an update on the status of the request. The County replied that your request was still declined due to the pending litigation exemption. Although you requested that this denial be reevaluated because you believe the pending litigation exemption is limited to situations where a litigant seeks information for the purpose of that litigation, your request remained denied. This Petition followed.

In the Petition, you argue that the County misapplied the pending litigation exemption, because you believe this exemption is intended to be utilized when a party to litigation seeks to obtain information for the purposes of that litigation. You allege that the corporation you represent, the Energy and Policy Institute (“EPI”), is not a party to the litigation with the County and is solely seeking these records for the purpose of advancing the public’s right to know.

The County, through its legal counsel, replied to this Petition (“Response”) and enclosed the affidavit of the County’s Administrator, who attests that the County is a named party in the pending litigation, *Renewable Redevelopment, LLC v. Sussex County Council*, Del. Super. C.A. No. S24A-12-002-MHC. This litigation involves the appeal of the denial of a conditional use application for an electric substation for an offshore wind farm. Although the County acknowledges the EPI is not a party to the litigation, the County argues that the EPI is an interested entity to the litigation, whose mission relating to renewable energy aligns with the appellant in the pending litigation. The County also points to the EPI’s website which states “[o]ur findings inform community leaders, consumer advocates, environmentalists and others so that they have the insight they need to hold corporations and politicians accountable, and to create a cleaner and fairer energy system.”¹ The County further contends that the requested records meet both prongs of the test for the pending litigation exemption, including that litigation is pending, and the request pertains to the pending litigation. The County asserts that the topic of the request – offshore wind – is at the heart of the litigation, and each of the Councilmembers “whose emails were requested voted on the conditional use that was appealed in the Renewable Redevelopment Litigation.”²

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.”³ FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁴ The public body has the burden of proof to justify its denial of access to records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶

¹ Response.

² *Id.*

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

⁴ 29 Del. C. § 10003(a).

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”⁷ A requesting party need not be a litigant in the pending litigation for the exemption to apply. In considering this exemption, we must discern whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.⁸ The relationship between these requested records and this litigation is considered, including the timing and nature of the requests with respect to the pending litigation.⁹ The County Administrator’s affidavit makes clear that litigation is pending and the requested records relate to that litigation. The litigation pertains to the denial of a conditional use application for an electric substation for an offshore wind farm, and this request, regarding “offshore wind,” sought emails from councilmembers who voted on the conditional use appeal that is subject to appeal in the pending litigation. Accordingly, we find that the requested records are exempt under Section 10002(o)(9).

CONCLUSION

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

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: J. Everett Moore, Jr., County Attorney

⁷ 29 *Del. C.* § 10002(o)(9).

⁸ See, e.g., *Del. Op. Att’y Gen.* 21-IB20, 2021 WL 4351857, at *2-3 (Sept. 14, 2021); *Del. Op. Att’y Gen.* 21-IB02, 2021 WL 559557, at *2 (Jan. 21, 2021) (“[W]e believe that the application of this exemption should be limited to determining whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.”).

⁹ *Del. Op. Att’y Gen.* 24-IB36, 2024 WL 4291960, at *3 (Sept. 17, 2024).