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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 26-IB06

February 3, 2026

VIA EMAIL

Gary Binns
binnsgl@yahoo.com

RE: FOIA Petition Regarding New Castle County

Dear Mr. Binns:

We write in response to your correspondence, alleging that New Castle 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's responses to your request did not violate FOIA, as alleged in the Petition.

BACKGROUND

On October 31, 2025, you submitted a FOIA request to New Castle County, to the attention of the Departments of Land Use and Public Works. The request sought sixteen items pertaining to your property and the related access easements identified by their instrument numbers. The request noted that you sought all records, documents, notices, memoranda, emails, correspondence, drafts, reports and any related items pertaining to the sixteen items. On November 26, 2025, the Department of Public Works responded to each item. The Department of Public Works provided records responsive to items 1, 2, 11, 12, 14, 15, and 16. For items 5 and 6, the Department inquired whether you sought an email search for these items; if so, the Department noted additional time would be needed and a cost estimate would be provided. For the remaining items, the Department indicated responsive records did not exist and for some of the items, referred you to another entity for further inquiry.

Following your receipt of this response, you replied to the Department of Public Works on December 2, 2025, stating these produced records were ones you provided to the Department and do not represent the Department's own records. Further, you objected to the "no records exist" response to several items, as you believe that records must exist based on the County's role in your new construction home and the related easement. You clarified that the scope of your request included "all documentation in New Castle County's possession regarding the New Castle County-owned easement and accessway associated with [the parcel number], specifically including: [a]ll employees, officials, and external parties involved in the drafting and finalization of both easement agreements; [a]ll surveys, engineering plans, documentation, and studies related to both easement agreements; [a]ll documentation related to the septic barrel located on this easement; and all final and draft easement contracts and agreements related to [your] property."¹ You wrote again on December 15, 2025, stating that the deadline has passed and that the records must exist because you constructed a new home and the Department of Land Use approved the construction and site plan and use of a County-owned accessway and easement.

The Department of Public Works responded a day later, affirming they have provided all responsive records and asking if you would like the Department to perform email searches for items nos. 5 and 6. You replied shortly thereafter that you do not seek email searches for items nos. 5 and 6. You objected that the production was a "single, mixed-up file" and reiterated that the County had not performed a diligent search for all responsive records. The Department replied on December 18, 2025 with an additional responsive document it located and stated that all responsive Public Works records had been produced and the matter was closed. On December 24, 2025, you stated that you are seeking all the records relating to the accessway and easement that were part of the County's permitting process and the land is owned by the County; you allege that the records provided to date "do not capture the full history or current status of the permitting process for this County-owned land."² You requested a more thorough search and to meet with relevant staff.

While these communications with Public Works were occurring, the Petition indicates you were engaging in similar correspondence with the Department of Land Use regarding your Land Use records request for the same items. The Department initially stated it did not have any responsive records because the Department does not handle recorded accessways or easements; however, after receiving your email asking for additional searches of the site plan approval files and permitting records for your parcel, the Department provided its records regarding the land development and parcel on December 15, 2025 and noted that there are no approved or recorded record plans for your property, so there are no engineering or planning files to provide. That same day, you emailed that you continued to object to the adequacy of the search and clarified the same four categories should be included, which matched the list you sent to Public Works. The Land Use staff then followed up with a second production on December 19, 2025 with all records regarding your original building permit. On December 24, 2025, you emailed Land Use a final time and objected to the adequacy of the search, as you believe these responses were still

¹ Petition, p. 13.

² *Id.*, p. 8.

incomplete. You again requested a more thorough search and to meet with relevant staff. This Petition followed.

In the Petition, you allege that the County violated FOIA by failing to conduct a reasonable search for public records and failing to provide the complete document production within the statutory timeframe. You argue that the County's assertion that records do not exist is "factually impossible based on the County's own regulatory and proprietary history with the property in question."³ You state that your property underwent new construction and the construction approvals by the Departments relied on a specific accessway and easement that is owned by the County. You state that the "request includes documentation regarding a septic barrel located on this County-owned easement [and] [t]he installation and maintenance of such infrastructure on County property requires specific engineering plans, surveys, and agreements which the County is required to maintain."⁴ You allege that the County likely failed to search the correct departments where these proprietary and engineering records would be housed. You identified a list of employees you believe to be in possession of the requested records. In addition, you allege that the County's production of "a single, mixed-up file" was unacceptable; rather, "all responsive documents must be produced as single files with proper descriptions to ensure traceability and completeness."⁵

On January 13, 2026, the County, through its legal counsel, responded to your Petition. The County argues it has endeavored to provide all responsive records and provided several affidavits from the Department staff to demonstrate its search efforts. The Public Works FOIA Coordinator attests that the search included identifying the custodians, divisions, and systems reasonably likely to maintain the responsive information, issuing search directives, conferring with knowledgeable staff about the parameters, and collecting potentially responsive records from all identified sources. The Public Works FOIA Coordinator, under oath, listed the employees determined likely to have responsive records and stated that if records existed, these individuals would have access. The FOIA Coordinator attests that two of these employees provided records in November 2025, and a department employee provided another record responsive to your first and second request on December 17, 2025. The Department supplied a second affidavit from the Parks Division Manager, attesting that to the best of the Manager's knowledge, no septic system is near your property in the adjacent park and consequently, the Department has no records of any septic system to provide.

The Assistant Land Use Administrator, who processed the FOIA request to Land Use, also provided an affidavit, attesting to reviewing the two Land Use electronic file archives, in addition to the Department's engineering, planning, and permit archive records. The Administrator states another search was performed after your objection that records must exist, and you were sent the septic variance material and all property mapping cards scanned into Department records. The

³ *Id.*, p. 1.

⁴ *Id.*, p. 2.

⁵ *Id.*, p. 16.

Administrator attests that because the Administrator determined that there is no subdivision or land development plan recorded for the subject property or neighboring property, there are “no subdivision files or engineering files in the Department’s possession.”⁶ The Administrator states that all records in the applicable single family dwelling permit file were forwarded to you on December 19, 2025. The Administrator states it is her understanding that “any Department files related to an accessway or easement on the subject property would be located in the file of an associated record plan” and without such a plan, the Administrator “would not expect the Department to have a record pertaining to accessways or easements tied to the subject property.”⁷ The County argues that, as evidenced by the affidavits, it has produced all records in its possession related to the easement, as well as the construction permit, certificate of occupancy, and the purported septic system.

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 The public body has the burden of proof to justify its denial of access to records.¹⁰ In certain circumstances, a sworn affidavit may be required to meet that burden.¹¹

The Petition first claims that the County’s responses to its requests are incomplete, because you believe that additional responsive records must exist. The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”¹² “[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”¹³ Generalized assertions in the affidavit will

⁶ Response, Aff. of Assistant Land Use Administrator, dated Jan. 13, 2026.

⁷ *Id.*

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 *Id.* at 1010.

¹³ *Id.* at 1012.

not meet the burden.¹⁴ For example, the Superior Court of Delaware determined that an affidavit outlining that legal counsel inquired about several issues, without indicating who was consulted, when the inquiries were made, and what, if any documents, were reviewed, was too generalized to meet this standard.¹⁵

In the Petition, you argue that the County must have more records than it produced, because the County owns the park adjacent to your property, granted access to your property via an easement, and issued construction permits for your property. The County contends that it has performed an adequate search and provided all the easement records and the land use records concerning the permit and certificate of occupancy. The County provided sworn evidence to support its search efforts. The Public Works FOIA Coordinator attests that the appropriate custodians were identified and they were instructed to search; the Coordinator also identifies who provided records. The Parks Division Manager swore under oath that to the Manager's knowledge, there is no septic system near your property on the park and thus, no records existed with respect to the septic system. The Assistant Land Use Administrator attested to the specific searches and productions she personally made, including the files related to the construction permit and certificate of occupancy. Based on the sworn representations, we find that the County demonstrated under oath that its search for the requested records was adequate under FOIA.

The Petition's second claim is that the County violated FOIA by delivering the records in the format of a single "mixed-up" pdf document. You contend that FOIA requires the responsive records to be delivered as single pdf files with descriptions of each file. The FOIA statute does not contain this requirement; we find no violation in this regard.

CONCLUSION

Based on the foregoing, we conclude that the County did not violate FOIA in its responses to your request, as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

¹⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Del. Super. Jun. 7, 2022) ("The Court finds that the generalized statements in the Affidavit do not meet 'the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.'").

¹⁵ *Id.*

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Brian J. Merritt, Sr. Assistant County Attorney