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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 26-IB09

February 20, 2026

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 violated FOIA by failing to meet its burden to justify denying access to the full scope of records you requested.

BACKGROUND

On December 3, 2025, you submitted a FOIA request to Sussex County seeking records regarding "Caesar Rodney Institute," as follows:

Any and all communications, including emails (sent, received, BCC, and CC), email attachments, as well as entire threads in which responsive emails may be nestled within and communications via messaging apps (ex, Signal, Slack, Whats App) sent to or from City Council members Douglas Hudson and/or John Rieley which include the following emails and email domains: [@caesarrodney.org, @townofdeweybeach.com, and a list of

individual emails]. Please limit the timeline of this request from January 1, 2024 to the date of processing this request.

Any and all communications, including emails (sent, received, BCC, and CC), email attachments, as well as entire threads in which responsive emails may be nestled within and communications via messaging apps (ex, Signal, Slack, Whats App) sent to or from City Council members Cynthia Green and/or Mark Schaeffer which include the following emails and email domains: [@caesarrodney.org, @townofdeweybeach.com, and a list of individual emails]. Please limit the timeline of this request from January 1, 2024 through December 31, 2024.¹

The County denied access to these records on December 27, 2025 due to the pending litigation related to the offshore wind project. The County also notes that this request is substantively identical to your previous request that was the subject of a previous FOIA Attorney General Opinion, except that the topic was changed to “Caesar Rodney Institute” and omitted two email addresses. This Petition followed.

In the Petition, you argue that the County has not sufficiently explained the application of the pending litigation exemption in this case, as the cited case is not mentioned and the Caesar Rodney Institute is not a party to the cited litigation. You believe that the County has improperly relied on the previous FOIA opinion to deny this request and impermissibly speculated about the purpose of your request; you claim the County’s assertion in its response to the former petition that you are coordinating with the litigants on this matter is false and baseless. You assert that the County has not identified how all the potentially responsive records to your request pertain to the pending litigation and the County has wrongfully declined to conduct a records search. You contend that the County should be required to search, provide records unrelated to the litigation, explain which records pertain to the litigation, and how.

The County, through its legal counsel, replied to this Petition (“Response”) and enclosed the affidavits of the County Administrator and the Assistant Sussex County Attorney, who attests that the County is a named party in the litigation, *Renewable Redevelopment, LLC v. Sussex County Council*, Del. Super. C.A. No. S24A-12-002-MHC. The sworn statements of the County’s counsel indicate this case continues to be active and was subject to a stay which was expected, at that time, to be shortly lifted. Both affiants verify that this litigation involves the appeal of the denial of a conditional use application for an electric substation for an offshore wind farm. The County Administrator also attests that the County is now a party to a second lawsuit in the Court of Chancery regarding the constitutionality of certain legislation related to offshore wind. The County reiterates its position from the last opinion that your organization, the Energy and Policy Institute (“EPI”), is “an interested entity with an agenda which could work in tandem with the

¹ Petition.

Appellant in the pending litigation” because the EPI website states a mission which includes efforts to challenge politicians who oppose renewable energy sources, such as wind.²

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 that pending litigation. The County asserts that this second prong is met because this request is substantively the same as your former request seeking emails related to offshore wind and each of the councilmembers whose emails were requested voted on the conditional use that was appealed in the Renewable Redevelopment Litigation. The County denies its response was based on an analysis of your purpose; rather, it considered the context of your request and noted the objective similarity between this request and your former request which was denied. The County maintains that this request is not subject to FOIA on its face and a search therefore is not required. The County argues that you should not be able to obtain records by merely framing the request broadly or referencing third parties that are tangentially related to the litigation; a public body should be able to recognize when a requesting party is seeking to circumvent an established FOIA exemption, especially when the requesting party’s position is opposed to the County’s litigation position. The County states it is a pretextual attempt to obtain the records that were already denied and considered in a previous Attorney General Opinion.

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

Judicial Watch, Inc. v. University of Delaware provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”⁷ “[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

² Response, p. 4.

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.

⁷ *Id.* at 1010.

determine whether there are responsive records and the results of those efforts.”⁸ Generalized assertions in the affidavit will not meet the burden.⁹ 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.¹⁰ In addition to these standards, when records are withheld, the reasons for withholding the records must be stated in the response to the requesting party.¹¹ Depending on the asserted exemptions, an affidavit may be required to support the assertion of the exemptions.¹²

The request at issue in this Petition is substantially similar to the request considered in Attorney General Opinion No. 25-IB50, except that its scope has been expanded by replacing the topic “offshore wind” with “Caesar Rodney Institute” and adding two email addresses. With its broadened scope, particularly changing the topic of records you seek, it is unclear from the face of the request whether all the requested records would be subject to FOIA. Although a subset of these communications pertaining to the pending offshore wind litigation would not be subject to disclosure as previously decided, we find that the County violated FOIA by failing to demonstrate its denial of access to all requested records under this request was appropriate under FOIA.¹³

The Petition’s proposed remedy includes a request that the County provide a list of the exempt litigation-related records it withheld and include justifications for withholding them; that proposal is declined, as this is not authorized under FOIA.¹⁴ Rather, we recommend that the County, in compliance with the timeframes set forth in Section 10003, search for responsive

⁸ *Id.* at 1012.

⁹ *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.’”).

¹⁰ *Id.*

¹¹ 29 *Del. C.* § 10003(h)(2).

¹² *See Flowers v. Office of the Governor*, 167 A.3d 530, 549 (Del. Super. 2017); *see also Judicial Watch, Inc.*, 267 A.3d at 1010-11.

¹³ The reasons for exempting communications related to the offshore wind litigation from disclosure was addressed in Attorney General Opinion No. 25-IB50. Likewise, in this case, the County presented sworn statements in its Response that two pending suits pertain to offshore wind, and the County is not required to produce the councilmembers’ communications pertaining to those pending suits.

¹⁴ 29 *Del. C.* § 10003(h)(2) (“If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial. The public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.”).

records and supplement its response to this request with any additional records, responses, or information, if appropriate under FOIA. To the extent access to any responsive records is denied, the reasons for such denials are recommended to be stated in the supplemental response. To the extent authorized fees for processing this request are anticipated, the County may present a cost estimate, compliant with Section 10003(m), in connection with this supplemental response.

CONCLUSION

For the reasons set forth above, we conclude that the County violated FOIA by failing to meet its burden to justify denying access to the full scope of records you requested.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: J. Everett Moore, Jr., County Attorney
Dorey L. Cole, Deputy Attorney General