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

### Attorney General Opinion No. 26-IB13

March 26, 2026

#### VIA EMAIL

Maggie Reynolds  
Spotlight Delaware  
[mreynolds@spotlightdelaware.org](mailto:mreynolds@spotlightdelaware.org)

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

Dear Ms. Reynolds:

We write in response to your correspondence alleging that the City of Dover 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 did not violate FOIA by withholding records under the attorney-client privilege and personnel file exemption, nor by failing to produce an affidavit with the supplemental records production.

#### **BACKGROUND**

On September 26, 2025, you submitted a FOIA request seeking "all emails, text messages and/or written communications sent from or received by Dover Police Chief Thomas Johnson and/or Mayor Robin Christiansen beginning May 1, 2025 that include the following key words: 'FOP' and/or 'Fraternal Order of Police' and/or 'no confidence' and/or 'resign' and/or 'Mullaney' and/or 'Penn State' and/or 'PSU' and/or 'NOCAP' and/or 'town hall' and/or 'Lewis' and/or 'Brian' and/or 'Sudler' and/or 'Roy' and/or 'Fenwick Island' and/or 'city vehicle.'"<sup>1</sup> The City denied access to the requested records, invoking the pending or potential litigation exemption.

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<sup>1</sup> Petition dated Nov. 3, 2025.

You filed a petition with this Office challenging the propriety of this response, and this Office issued its determination in Attorney General Opinion No. 25-IB59. This Office found that the City failed to support its denial of access to these records based on the potential litigation exemption and the Law Enforcement Officers' Bill of Rights. This Office recommended that "within the timeframes provided in Section 10003, the City review its responsive records and determine whether any records, or parts thereof, should be made available to you, as appropriate under FOIA and supplement its response to the request in light of this Opinion."<sup>2</sup> Following this Opinion, you received a supplemental production of records from the City, including a one-page privilege log indicating some records had been withheld pursuant to the attorney-client privilege and the personnel file exemption.

You then filed this Petition, making three claims about this supplemental response. First, you argue that the attorney-client privilege was applied in an overly broad manner. Because it was previously determined that the City did not meet its burden to invoke the potential litigation exemption due to a lack of nexus between the requested records and the potential litigation, you contend that the City's claim – that nearly a dozen records are exempt under the attorney-client privilege – is moot. Second, you state that the City improperly applied the personnel file exemption to several records because the City did not adequately weigh the balance between the public interest in open discussion of governmental matters and the rights of employees to have their work performance considered in private. As the police chief is part of a significant public controversy and one of the most important appointed public servants in Delaware's capital and second largest city, this public interest outweighs his right to have his personnel matters considered in private. Third, you allege that the City violated FOIA by failing to include an affidavit with the privilege log explaining why the records were excluded.

On March 10, 2026, the City, through its legal counsel, responded to this Petition ("Response"). The City argues its supplemental response did not violate FOIA, as you alleged. The City maintains that its use of the attorney-client privilege was appropriate, and it enclosed the affidavit of City counsel to support this assertion. The affidavit states that the City Solicitor personally reviewed the responsive records and attests that the records withheld under attorney-client privilege were communications to and from a lawyer and the client and made for the purpose of facilitating the rendition of legal advice and no exception applies. The Solicitor states under oath the legal authority he reviewed for invoking attorney-client privilege and attests that there was a good faith basis to withhold these records on the attorney-client privilege. The Solicitor also asserts that the two withheld emails to and from human resources staff involve confidential personnel matters and were appropriately withheld. The Solicitor further avers that there was a good faith basis to exclude these two emails, based on the review of the relevant legal precedent, which was listed in the affidavit.

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<sup>2</sup> *Del. Op. Att'y Gen. 25-IB59*, 2025 WL 3633498, at \*3 (Dec. 4, 2025).

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

In this case, you first claim that the attorney-client privilege was improperly applied, as this Office previously determined that the potential litigation exemption was not supported and the City did not meet its burden of showing the nexus between the potential litigation and the requested records. The attorney-client privilege does not relate to the potential litigation exemption; thus, the fact that the potential litigation exemption was not previously met has no bearing on this matter. Rather, the City established that it appropriately withheld these records by providing an affidavit from the Solicitor demonstrating that he reviewed the records personally and applied this well-recognized privilege with a clear understanding of the privilege.<sup>7</sup>

Your second claim is that the personnel file exemption was improperly applied. The personnel file exemption excludes from the definition of public record any “personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.”<sup>8</sup> The Solicitor noted that the two emails withheld were to and from the City human resources staff about a confidential personnel matter and specifically stated applicable legal precedent to demonstrate that he applied this exemption with a clear understanding. Thus, based on the sworn representations, we find that the City met its burden of showing both exemptions were appropriately applied here.

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

<sup>4</sup> 29 *Del. C.* § 10003(a).

<sup>5</sup> 29 *Del. C.* § 10005(c).

<sup>6</sup> *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

<sup>7</sup> *See Flowers v. Office of the Governor*, 167 A.3d 530, 549 (Del. Super. 2017) (finding that a detailed written submission of the reasons for withholding the records along with an affidavit from legal counsel who attested to personally reviewing the records and affirming the basis for withholding records was sufficient to meet the burden, as it showed that “the Governor’s Office carefully applied well-recognized privileges with a clear understanding of those privileges when it applied them”); *Judicial Watch, Inc.*, 267 A.3d at 1010-11 (requiring necessary facts to be submitted under oath to justify the denial of records).

<sup>8</sup> 29 *Del. C.* § 10002(o)(3).

The third claim is that the City was obligated to provide an affidavit with its privilege log explaining why the records were excluded. A public body is not required to provide a privilege log to accompany a production of records.<sup>9</sup> Even if a privilege log was required, the statute's requirement for providing an affidavit is not triggered until an action under Section 10005 – namely, a FOIA petition or judicial action – is filed; an affidavit is not required to be included with the response to a FOIA request.<sup>10</sup> Thus, we also found no violation with respect to this third claim.

### **CONCLUSION**

For the reasons set forth above, we conclude that the City did not violate FOIA by withholding records under the attorney-client privilege and personnel file exemption, nor by failing to produce an affidavit with the supplemental records production.

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: Daniel A. Griffith, City Solicitor

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<sup>9</sup> 29 *Del. C.* § 10003(h)(2) (“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.”).

<sup>10</sup> 29 *Del. C.* § 10005(c); *see also Del. Op. Att’y Gen.* 25-IB06, 2025 WL 503941, at \*2 (Jan. 21, 2025) (“As a public body does not have an obligation to meet its burden by providing an affidavit with its response to a FOIA request, we find that the Division did not violate FOIA in this regard.”).